No. 01-821

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In The
Supreme Court of the United States

ALEX STEVENSON, by and through his father and next friend, Elmer William Stevenson; ELMER WILLIAM STEVENSON on his own behalf,

Petitioners,

v.

MARTIN COUNTY BOARD OF EDUCATION; WILLIE C. PEELE, Superintendent of Martin County Schools, individually and in his official capacity; HARRY D. RESPASS, Principal of Williamston Middle School, individually and in his official capacity; SWANOLA CHANCE, teacher at Williamston Middle School, individually and in her official capacity,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether school officials have a constitutional obligation under the Due Process Clause to protect a student's liberty interest in bodily integrity and property interest in education from ongoing, known classmate violence within the school environment?

Whether a parent's removal of a student subjected to a hostile school environment created by the school officials' failure to prevent acts of classmate violence supports the theory of "constructive expulsion" which is subject to the requirements of the Due Process Clause?

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Other Authorities

Deborah Austern Colson, *Note: Safe Enough to Learn: Placing an Affirmative Duty of Protection on Public Schools under 42 U.S.C. Section 1983*, 30 Harv. C.R.-C.L. Rev. 169 (1995) 15

Adam Michael Greenfield, *Notes: Annie Get Your Gun "Cause Help Ain't Coming:" The Need for Constitutional Protection From Peer Abuse in Public Schools*, 43 Duke L.J. 588 (1993) 15

Susanna M. Kim, *Comment: Section 1983 Liability in the Public Schools after DeShaney: The "Special Relationship" Between School and Student,* 41 UCLA L. Rev. 1101 (1994) 15

Patty Rhule, *"Our Kids Are AFRAID. A year after Columbine, students in alarming numbers say that they fear the toxic combination of violence at school and easy access to guns. A Special Report on Teens and Safety,"*
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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Untied States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The district court's opinion (per Howard, M. J.) granting Respondents' motion to dismiss (Appendix ("Pet. App.") 18-29) is published at 93 F. Supp. 2d 644 (E.D.N.C. 1999). The court of appeals' opinion (*per curiam* Michael, Motz, and Traxler, J.J.) affirming (Pet. App. 1-17) is unpublished and the court of appeals' order denying rehearing and rehearing en banc (Pet. App. 30-31) is not otherwise published.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on February 6, 2001, and denied rehearing and rehearing *en banc* on March 6, 2001. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, and 42 U.S.C. § 1983, along with Article I, § 15 of the North Carolina Constitution, and N.C.G.S. §115C-105.45 *et. seq.* which are reprinted in the Appendix at pages 32-36.

STATEMENT OF THE CASE

A. OVERVIEW

First, this Court has not decided the nationally important issue of whether public school students have a constitutional right to protection from ongoing, known, student-on-student violence in the school environment which is permitted by the inaction of school officials.

Second, the Fourth Circuit Court of Appeals has entered a decision in conflict with the decisions of this Court and of the Third, Fifth, and Tenth Circuit Courts of Appeals as well as the North Carolina Supreme Court.

Finally, the circuit courts of appeal have struggled with determining the circumstances and situations where the State can be held liable for a violation of an individual's right to bodily integrity by non-state actors and need guidance from this Court.

B. FACTS AND COURSE OF PROCEEDING

The Petitioners are Alex Stevenson ("Alex") and his father Elmer William ("Bill") Stevenson. The Respondents are the Martin County School Board and school officials Principal Harry Respass, Superintendent Willie Peele, and Teacher Swanola Chance in their individual and official capacities (collectively the "School Board").

Both the District Court and the Fourth Circuit agreed that the complaint set forth a disturbing set of facts. (Pet. App. 3 & 22). At the time of the incidents alleged in the Complaint, Alex was a ten (10) year old, sixth grade student attending Williamston Middle School. During the first two months of school, Alex was repeatedly attacked by two thirteen (13) year old students and their friends. (Pet. App. 22). Concerned about his son's safety, Bill Stevenson complained to school personnel, including the Principal and Superintendent.

The problems began in August 1998, ten-year-old when Alex entered the sixth grade at Williamston Middle School in Martin County, North Carolina. (Pet. App. 3). He did not finish the year there, however. *Id.* In November his father had to remove him from Williamston Middle School and enroll him in a private school because of the repeated assaults that Alex suffered at the hands of several of his classmates. *Id.*

The abuse started as soon as the school year began and Alex was robbed, assaulted, harassed, intimidated, and brutally beaten by the same classmates repeatedly. *Id.* On numerous occasions, Alex's father met with the school Principal and complained about the ongoing abuse by the two older students, both of which were in Alex's sixth grade classes. (Pet. App. 3 & 4). The Principal promised he would remove the assailants from Alex's classes, but he did not. (Pet. App. 4).

Subsequently, Alex was punched by one of the assailants while attending his art class. *Id.* When Alex temporarily escaped from the attack, he asked his art teacher, Swanola Chance, for help. *Id.* Chance responded, "There isn't anything I can do." *Id.* She added, "You probably deserved it anyway." *Id.* Alex was granted permission to go to the principal's office, but the assailant and his friend followed Alex out of the classroom and chased him down the hallway. *Id.* Once they caught him, they knocked him to the floor and punched and kicked him in the head, throat, chest, arms and legs. *Id.* A teacher was also assaulted when she tried to assist Alex and eventually several other students restrained the two attackers. *Id.* Stevenson filed juvenile petitions against the two attackers and they admitted to assault with infliction of serious bodily injury. *Id.* It was, according to a school teacher, the "most brutal attack" that she had ever witnessed. (Pet. App. 21).

While the juvenile proceedings were pending and even though Alex promptly reported additional threats to the Principal, the assaults on Alex continued. (Pet. App. 5).

Because of the ongoing assaults and harassment and the school system's failure to remedy the problem, Stevenson enrolled Alex in a private school. *Id.* In addition, due to the repeated assaults and harassment, Alex suffered physical and emotional problems which required medical intervention and counseling. *Id.*

Alex sued the Martin County School Board and school officials Principal Harry Respass, Superintendent Willie Peele, and Teacher Swanola Chance in their individual and official capacities (collectively the "School Board") for deprivation of his liberty interest in bodily integrity and deprivation of his property interest in public education and alleged violations of the Due Process Clause of the Fourteenth Amendment and Section 1983 and also sought pendent jurisdiction for various State law claims. *Id.*

In addition, Alex alleged that the School Board was deliberately indifferent to his plight. In paragraph 78 of the Complaint, he alleged that:

> Defendants County Board, Peele, Respass, and Chance failed to take remedial actions to prevent further violence by Alex's classmates and their failure to take preventative measures created a dangerous school environment." (JA 17).[1]

Alex also alleged that:

> The actions of the Defendants County Board, Peele Respass and Chance resulted in serious, immediate and proximate harm to Alex Stevenson and **were taken or omitted in reckless disregard** to his health and safety. (JA 17)(emphasis added).

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[1] (JA #) refers to the Joint Appendix on file with the Fourth Circuit Court of Appeals.

> Defendants County Board, Respass, Peele and Chance **in reckless disregard of Alex's health, safety and welfare,** failed to take appropriate action to protect Alex form physical violence [and] emotional abuse by students in their school system." (JA 21)(emphasis added).
>
> Alex further asserted that:
>
> As a direct and proximate result of the Defendants' failure to provide Alex Stevenson with a safe and secure school environment and failure to protect Alex Stevenson from physical and emotional harm, Defendants County Board, Willie Peele, Harry Respass and Swanola Chance arbitrarily and capriciously deprived Alex Stevenson of his property interest to public education..." (JA 17).

The School Board filed a 12(b)(6) Motion to Dismiss the Stevensons' Complaint, and the District Court dismissed all of the Stevensons' claims. However, the District Court acknowledged that the "plaintiff allegations of deliberate indifference could state a claim for relief," if the defendant had had notice of a duty. (Pet. App. 26). Ultimately, the District Court rejected the deliberate indifference claim because the District Court analyzed the School Board's notice of a duty to respond exclusively under the Safe Schools Act ignoring the School Board's existing obligations pursuant to the due process clause. *Id.* Likewise, the District Court dismissed Alex's property claims because the District Court concluded that Alex's father had voluntarily removed Alex from Martin County Schools. *Id.*

Even though, the Stevensons never asserted school liability under the custodial relationship theory, the District

Court opined that the Stevensons failed to state a claim under the Fourteenth Amendment or Section 1983 because attendance at public school did not create a custodial relationship giving rise to a constitutional duty to protect. (Pet. App. 24). The School Board contended that the only way a special relationship exists is "when the agency, through incarceration or institutionalization or similar restraint, has deprived the person of the individual freedom to act and thus must assume the responsibility of protection." (Pet. App. 25). The Stevensons countered that the School Board was liable for deprivation of Alex's constitutional rights under two alternative theories proposed by this Court -- the *DeShaney* danger creation exception, and *Canton v. Harris'* deliberate indifference test. *DeShaney v. Winnebago County Dep't of Social Services,* 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989); *and, Canton v. Harris,* 489 U.S. 378 (1989).

In his Order, Judge Howard did not refer to the *DeShaney* decision, but instead relied exclusively on the Seventh Circuit's decision in *J.O. v. Alton Community Unit Sch. Dist. 11,* 909 F.2d 267,272 (7th Cir. 1990)(school officials not liable under compulsory school attendance laws for teacher sexual molestation of students). (Pet. App. 25). A position rejected by this Court in *Gebser v. Lago Vista Independent School Dist.,* 524 U.S. 274, 118 S.Ct. 1989, 141 L.Ed.2d 277 (1998).

In addition to Alex's right to freedom from bodily intrusion, the Stevensons argued that the North Carolina Constitution guaranteed Alex the privilege of public education and that the State's duty to protect that right was mandated by the N.C Constitution. N.C. Const. Art. I, § 15; and, N. C. Const. Art. IX, §2(2). The District Court and Fourth Circuit both ignored this alternative argument.

The Stevensons appealed Judge Howard's decision to the Fourth Circuit Court of Appeals. On appeal, the Stevensons contended that the District Court erred by not recognizing the liberty interest allegations contained in the

Complaint. The Stevensons also asserted that Alex had not voluntarily left the public school but was constructively expelled because of the hostile school environment created by the School Board. Finally, the Stevensons contended that the District Court erred by ruling dismissing their 1983 action based on the School Board's deliberate indifference to Alex's constitutional rights and that the School Board did have notice of their duty to prevent peer violence.

The Fourth Circuit affirmed the District Court's decision on the grounds that the school's inaction did not fit the danger creation exception and that there was no special relationship between the school and Alex which required the school to protect him. (Pet. App. 10-12). The Fourth Circuit refused to recognize the "novel constructive expulsion" theory and also affirmed dismissal of Alex's federal constitutional and Section 1983 claims. (Pet. App. 8).

The Stevensons filed a Motion for Rehearing or Rehearing En Banc because school safety was, and still is, a question of exceptional importance; and, that contrary to the Fourth Circuit's decision, Alex had alleged that the School Board intentionally or recklessly took steps to contribute to the violence. The Stevensons also contended that the Fourth Circuit had failed to view the facts in the light most favorable to Alex and impermissibly required a heightened pleading standard for their civil rights complaint.

The Fourth Circuit denied the Stevensons' motion for rehearing and this petition for writ of certiorari followed. (Pet. App. 30).

REASONS FOR GRANTING WRIT

The petition should be granted for two reasons. *First,* this court has not decided the nationally important issue of whether public school students have any constitutional right to protection from ongoing, known, student-on-student violence in the school environment which is permitted by the inaction of school officials.

Second, the Fourth Circuit's decision conflicts with the holdings of this Court, of other circuits, and the North Carolina Supreme Court in two important ways. It espouses the legal principle that without a custodial relationship schoolchildren have no constitutional right to protection of their bodily integrity or property interest in education. The Fourth Circuit's judgment also ignored the danger-creation and deliberate indifference exceptions recognized by this Court, its sister circuits, and the NC Supreme Court as alternative theories of State liability.

I. This Court Has Not Decided The Nationally Important Issue Of Whether Public School Students Have Any Constitutional Right To Protection From Ongoing, Known, Student-On-Student Violence In The School Environment Which Is Permitted By The Inaction Of School Officials.

School safety is a question of exceptional importance.[2] According to this Court, education "is perhaps

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[2] With respect to school violence, USA WEEKEND's 13th Annual Teen Survey of 129,593 students in grades 6-12 from urban, suburban and rural schools, public and private, more than a quarter of students in the survey reported that they do not feel safe from violence on school grounds and more than half said they would learn more if school were safer. Rhule, Patty, *"Our Kids Are AFRAID. A year after Columbine, students in alarming numbers say that they fear the toxic combination of violence at school and easy access to guns. A Special Report on Teens and Safety,"* USA WEEKEND, April 14-16, 2000 at 8-10.

the most important function" of government, *Brown v. Board of Education*, 347 U.S. 483, 493 (1954), and government has a heightened obligation to safeguard students whom it compels to attend school. *New Jersey v. T.L.O.*, 469 U.S. 325, 353, 105 S.Ct. 733, 749, 83 L.Ed 2d 720, 750-51 (1985)(Blackmun, J. concurring). Because school safety is so important, this Court has held that the special need for an immediate response to behavior that threatens either the safety of schoolchildren and teachers or the educational process justified the Court in excepting school searches from the warrant and probable-cause requirements. *Id.*

Recognizing that the primary duty of school officials and teachers is the education and training of young people, this Court held that the state has a compelling interest in assuring that the schools meet this responsibility. *T.L.O.*, 469 U.S. at 350, 105 S.Ct. at 747, 83 L.Ed 2d at 744 (O'Connor and Powell, J.J., concurring). Moreover, without first establishing discipline and maintaining order, teachers cannot begin to educate their students. *Id.* Apart from education, the school has the obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national concern. *Id.*

Since *T.L.O.*, school safety has been and still is a national concern.[3] Although the general populace would

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[3] In enacting safe school legislation in 1997, Congress found that "our nation's schools and communities are increasingly plagued by violence and crime. Appropriately 3,000,000 thefts and violent crimes occur in or near our nation's schools every year, the equivalent of more than 16,000 incidents per school day." 20 U.S.C. § 7102(3). The "tragic consequences of violence ... are felt not only by students and such student's families, but by such student's communities and the Nation, which can ill afford to lose such students' skills, talents and vitality." 20 U.S.C. § 7102 (5). According to Congress, violence prevention programs are "essential components of a comprehensive strategy to promote school safety." 20 U.S.C. § 7102(9).

agree that all students and school staff have a right to be safe in school, the Fourth Circuit's decision does not support such a conclusion. The Fourth Circuit held that even though the school population consists of students, teachers, and other school personnel, as a state actor, a school board is not liable for the acts of students unless there is a custodial relationship. *Stevenson v. Martin County School Bd.* (Pet. App. 11-12)(*quoting, DeShaney, supra,* at 201). Moreover, according to the Fourth Circuit, only affirmative action by the state creates danger: "Liability does not arise when the State stands by and does nothing in the face of danger. Failing to provide protection from danger does not implicate the State in the harm caused by third parties." (Pet. App. 9).

Protection from peer violence is not the only interest at stake for schoolchildren. All students have a constitutional right to procedural due process before a deprivation of a public education. *Goss v. Lopez*, 419 U.S. 565, 574, 42 L. Ed. 2d 725, 95 S.Ct. 729 (1975). North Carolina students have more than that; they have a constitutionally protected right to the "privilege of public education." N.C. Const. Art. I, § 15. Moreover, the North Carolina Supreme Court recognized that the constitutional provisions of North Carolina guarantee every child in North Carolina the right to receive a "sound basic public education" and held that the right to a free public education is explicitly guaranteed by the North Carolina Constitution. *Leandro v. State of North Carolina*, 346 N.C. 336, 345, 488 S.E.2d 249, 254 (1997). Because education is a fundamental right in North Carolina, "it is the duty of the State to guard and maintain that right." N.C. Const. Art. I, § 15. *Leandro, supra,* 346 N.C. at 345, 357; *see also, Webster v. Perry,* 512 F. 2d 612 (CA4 1975). This property interest in education is protected by the Due Process Clause of the Fourteenth Amendment. U.S. Const. Amend XIV, §§ 1, 5.

In addition to the Alex's liberty interest, the Stevensons contended that the School Board, Principal Respass, Superintendent Peele and Teacher Chance caused

the deprivation of Alex's property right to education. The District Court opined that Alex could not state a claim for the deprivation of his property interest because "Alex voluntarily left the public school to attend a private school." The Stevensons denied that his withdrawal was voluntary and, instead, asserted that Alex was "constructively expelled" because the hostile school environment. Constructive discharge in employment cases is analogous to the Stevensons' "constructive expulsion" theory because school is a child's work.[4] Based on the constructive discharge cases' decisions, constructive expulsion would require procedural due process to protect Alex's property interest in education. However, the Fourth Circuit rejected this "novel" theory.

The impact of the Fourth Circuit's interpretation of *DeShaney* is that inaction in the face of known student-on-student violence is acceptable. A school student can be harassed and assaulted by other students under the very nose of school personnel and the school has no obligation to stop the violence. Then when parents are forced to withdraw

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[4] A constructive discharge occurs when an "employer deliberately makes and employee's working conditions intolerable and thereby forces him to quit his job." *Bristow v. Daily Press, Inc.*, 770 F. 2d 1251, 1255 (*quoting Holsey v. Armour & Co., 743 F.2d 199, 209* (CA4 1984), *cert. denied*, 470 U.S. 1028, 84 L.Ed. 2d 784, 105 S.Ct. 1395 (1985)). A plaintiff alleging constructive discharge must prove two elements: deliberateness of the employer's action, and intolerability of the working conditions. *Id; accord, Munday v. Waste Management of North America, Inc.*, 126 F. 3d 239, 244 (CA4 1997) *cert. denied*, 522 U.S. 1116, 1401 L.Ed.2d 116, 118 S.Ct. 1053 (1998). The employer's intent may be established by showing "failure to act in the face of known intolerable conditions." *Bristow*, 770 F.2d at 1255. Also the employer "must necessarily be held to intend the reasonably foreseeable consequences of its actions." *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1354-55 (CA4 1995). The intolerability of the working conditions must be assessed by the "objective standard of whether a 'reasonable person' in the employee's position would have felt compelled to resign." *Bristow*, 770 F. 2d at 1255. Annoying actions are not sufficient for a constructive discharge claim. *Taylor v. Virginia Univ.*, 193 F. 3d 219 (CA4 1999).

their children from a hostile school environment, they have no constitutional remedy.

Even in this case, the Fourth Circuit agreed that "[t]he school surely could have done more to protect Alex, given the frequent and brutal attacks by McEachern and others," but determined that the "failure to protect by itself is not sufficient to trigger constitutional liability in this situation." (Pet. App. 12). A chilling thought for parents who leave their children at the schoolhouse door expecting that once inside those children have a right to be safe and free from bodily harm from other students. A even more frightening prospect in a case such as this where the School Board knows about pervasive peer violence but simply does not "do more" and is vindicated when they say: "There is nothing I can do about it."

Are school children entitled to State protection while they are attending school? This Court has not answered that nationally significant question.

II. The Fourth Circuit Has Entered A Decision In Conflict With The Decisions Of This Court And Of The Third, Fifth, and Tenth Circuit Courts Of Appeal as well as the North Carolina Supreme Court.

This Court's decisions in the *DeShaney* and *Canton* cases suggest that a municipality could be liable for third party violence if the state actor caused the injury, caused the individual to be subjected to the injury, or was deliberately indifferent to the constitutional rights of persons with whom the state actors came in contact.

The Supreme Court Test

What is the constitutional significance of state inaction in the face of known, ongoing constitutional violations of third parties? At least six (6) justices from this

Court have said that a state actor could be liable for its inaction in the face of known, uncorrected constitutional violations by private parties. *Canton*, 489 U.S. 378, 395 (O'Connor, Scalia, Kennedy, J.J. consenting opinion); *and, DeShaney*, 489 U.S. 189, 204 (Brennan, Marshall, Blackmun, J.J. dissenting opinion).

The prerequisites for state liability are notice of the violation and an opportunity to correct. School officials must have had prior notice of the violation and be afforded an opportunity to correct the deficiency before liability attaches. *Davis v. Monroe County Board of Education,* 526 U.S. 629, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999)(school officials must have notice of student-on-student sexual harassment); *see also, Gebser v. Lago Vista Independent School Dist.,* 524 U.S. 274, 118 S.Ct. 1989, 141 L.Ed.2d 277 (1998)(school officials must have notice of teacher-student sexual harassment). Justice O'Connor wrote that notice to the State is required so that the State has an opportunity to conform to constitutional dictates. *Canton, supra,* at 395.

Moreover, Justices O'Connor, Scalia and Kennedy addressed the issue of state inaction and stated in *Canton*, that a "'[p]olicy of inaction' is the functional equivalent of a decision by the city itself to violate the Constitution." *Id.* Where a "claim of municipal liability is predicted upon a failure to act, the requisite degree of fault must be shown by proof of a background of events and circumstances" and the state must be given some form of notice and opportunity to conform to constitutional dictates. *Id.*, at 394-395. Similarly, in *DeShaney*, Justices Brennan, Marshall and Blackmun acknowledged the "substantive ramifications in a constitutional setting that distinguishes sharply between action and inaction." *DeShaney,* 489 U.S. 189, 204 (Brennan, Marshall, Blackmun, J.J. dissenting opinion).

The *DeShaney* dissent implies that in some circumstances the Constitution does establish positive rights and concluded that "cases from the lower courts have also recognized that a State's actions can be decisive in assessing

the constitutional significance of subsequent inaction." *Id.* at 205; *see, e.g. White v. Richford*, 592 F.2d 381 (CA7 1979)(police officers violated due process when, after arresting the guardian of three young children, they abandoned the children on a busy stretch of highway at night). The dissent rejected what they called the majority's "stingy" approach that direct physical control was the only basis for State liability. *DeShaney*, at 206-207.

Also, the dissent concluded that, "if a State cuts off private sources of aid and then refuses aid itself, it cannot wash its hands of the harm that results from its inaction." *Id.*, at 207. Liability arises not from the third party's acts but from the school defendants official decision not to remedy the violation. *Davis, supra,* 119 S.Ct. at 1671.

School safety is so important that this Court has permitted schools to infringe on student's constitutional rights in order to promote school safety. *See Bethel Sch. Dist. No. 403 v. Fraser,* 478 U.S. 675, 684, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986)(holding that school authorities may punish children for making "vulgar" remarks in recognition of the "obvious concern on the part of ... school authorities acting in *loco parentis*, to protect children from exposure to sexuality explicit, indecent, or lewd speech"); *New Jersey v. T.L.O.*, 469 U.S. 325, 340, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985)(balancing the "school-child's legitimate expectations of privacy" against the "school's equally legitimate need to maintain an environment in which learning can take place" by relaxing search and seizure restrictions in the school context); *Ingraham v. Wright,* 430 U.S. 651 (1977)(holding that schools may engage in corporal punishment of their students in order to maintain discipline).

By allowing schools to infringe on students' constitutional rights in order to promote school safety, this Court has implicitly acknowledged that schools are best able to prevent harm. Imposing sanctions against the State under a fact-specific test would serve to deter schools from ignoring school violence and induce schools to establish

concrete policies for responding to threats of violence and allegations of abuse. In fact, it has been argued that:

> [i]t would be inherently inconsistent to afford schools these broad rights and powers without imposing on the schools the corresponding duties and liabilities. If schools are given the rights to discipline and control student behavior, they should also be liable when they, in reckless indifference, fail to exercise those rights responsibly.

See Susanna M. Kim, *Comment: Section 1983 Liability in the Public Schools after DeShaney: The "Special Relationship" Between School and Student,* 41 UCLA L. Rev. 1101, 1135 (1994).[5]

The *Canton* standard was first applied in the school context for student-on-student violence by this Court in *Davis.* According to the *Davis* decision, school officials have a duty to protect students against acts of private violence if their "deliberate indifference" caused the danger. *Davis, supra,* 119 S.Ct. at 1672-73. Moreover, in *Davis*, the Court addressed the constitutional significance of inaction. *Id.* 119 S.Ct. at 16773-74. In so doing, the Court rejected the school board's analysis that affirmative action is required for liability and adopted Justice Brennan's dissenting analysis that "inaction can be every bit as abusive of power as action, that oppression can result when a State undertakes a vital duty then ignores it." *DeShaney, supra*, 489 U.S. at 212

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[5] Deborah Austern Colson, *Note: Safe Enough to Learn: Placing an Affirmative Duty of Protection on Public Schools under 42 U.S.C. Section 1983*, 30 Harv. C.R.-C.L. Rev. 169 1995); Adam Michael Greenfield, *Notes: Annie Get Your Gun "Cause Help Ain't Coming:" The Need for Constitutional Protection From Peer Abuse in Public Schools*, 43 Duke L.J. 588 (1993); and, *see also, D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1380 (CA3 1992)(Sloviter, J., dissenting), *cert. denied,* 113 S.Ct. 1045 (1993).

(Brennan, J., dissenting opinion). Justice Brennan also refused to "construe the Due Process Clause to permit a State to displace private sources of protection and then, at the critical moment, to shrug its shoulders and turn away from the harm that it has promised to try to prevent." *Id.*

As in the *Davis* and *DeShaney* cases, the question here is whether it can be fairly stated that the State deprived Alex of his liberty interest in "freedom from . . .unjustified intrusions on personal security." *DeShaney*, 489 U.S. at 195 (quoting *Ingraham*). Neither the *Davis* plaintiffs nor the Stevensons sought to hold the school defendants liable for a third party's action. Rather, Bill and Alex Stevenson were seeking to hold the school defendants liable for their own decision to remain idle in the face of known student-on-student violence in the school. This Court concluded, in *Davis,* that the school defendants could be liable for damages only where the school defendants intentionally acted or remained deliberately indifferent to acts of student-on-student sexual harassment. Liability arises from "an official decision by the recipient not to remedy the violation," not from the actions of the private party. A*ccord, Gebser,* 524 U.S. at 290; *see also, Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 75, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992).

Where school officials were aware of peer violence, but discouraged and minimized such reports, and perhaps even encouraged a climate to flourish where students were victimized, those state actors should be liable for their reckless indifference to students' safety. However, where the school had no notice or warning of injuries that would occur, a failure to protect would not render the school liable.

In addition to the notice and deliberate indifference requirements, control appears to be another determinative factor in deliberate indifference cases. This Court observed in *Vernonia School Dist. 47J v. Acton,* "that the nature of [the State's] power [over public schoolchildren] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults." 515 U.S. 646,

655 (1995). This Court further stated that "on more than one occasion, that it had recognized the importance of school officials' comprehensive authority ... , consistent with fundamental constitutional safeguards to prescribe and control conduct in the schools." *Davis, supra*, 119 S.Ct. at 1673. (*citing Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 507 (1969); *see also, New Jersey v. T.L.O.*, 469 U.S. 325, 342, n. 9 (1985); *Davis v. Monroe County Bd. Of Educ.*, 74 F 3d 1186, 1193 (CA11 1996)("The ability to control and influence behavior exists to an even greater extent in the classroom than in the workplace...").

Contrary to the Fourth Circuit's opinion that an affirmative act is required for liability, this Court has held that a school district can be held directly liable for its failure to act in circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs. *Davis, supra,* 119 S.Ct. at 1671-74. When the harasser or assailant is under the disciplinary authority of the school district and the school district retains substantial control over the context in which the harassment occurs, liability attaches. *Id.*

This Court has further suggested that the behavior must be serious enough to have the systemic effect of denying the victim equal access to an educational program or activity which must be determined on a case by case basis. *Id. supra,* 119 S.Ct. at 1675-76. Because of the physical assaults and harassment, Alex was withdrawn from Williamston Middle School by his father. An action such as Alex's, which claim physical deprivation of access to school resources would, based on *Davis*, be an example of a student-on-student violence case capable of triggering a claim.

The safety, well-being, and education of the nation's schoolchildren are of paramount importance and merit constitutional protection. In light of this Court's reasoning in *Canton* and *Davis*, the school-student relationship is such that it should impose on the schools the affirmative duties of

providing a safe learning environment for their students and protecting them from harm.

The North Carolina Supreme Court – Public Duty Doctrine

The Fourth Circuit's decision conflicts with this Court's decisions and those of the North Carolina Supreme Court. The general common law rule, known as the public duty doctrine, is that state actors act for the benefit of the public, and therefore, there is no liability for the failure to protect specific individuals. *South v. Maryland ex rel. Pottle,* 59 U.S. 396 (1855). The N.C. Supreme Court has extended the public duty doctrine to state agencies required by statute to conduct inspections for the public's general protection. *See Stone v. N.C Dep't of Labor,* 347 N.C. 473, 495 S.E.2d 711, 717, *rehearing denied,* 348 N.C. 79, 502 S.E.2d 836, *cert. denied,* 119 S.Ct. 540, 142 L.Ed. 2d 449 (1998). However, the N.C. Supreme Court has never expanded the public duty doctrine to any local government agencies other than law enforcement departments when they are exercising their general duty to protect the public. *Lovelace v. City of Shelby,* 351 N.C. 458, 526 S.E.2d 652, 654 (2000); *see also, Isenhour v. Hutto,* 350 N.C. 601, 517 S.E. 2d 121 (1999)(refusing to extend the public duty doctrine to shield a city from liability for the allegedly negligent acts of a school crossing guard).

Even in limited situations, police and fire departments can be liable. *Davis v. Messer,* 119 N.C. App. 44, 457 S.E.2d 902, *disc. review denied,* 341 N.C. 647, 462 S.E.2d 508 (1995)(Town liable when plaintiffs relied on firefighter's promise to respond to fire as their exclusive source of aid and firefighters failed to respond to fire resulting in complete destruction of plaintiffs' home)); *see also, Slakan v. Porter,* 737 F.2d 368, 377 (CA4 1984), *cert. denied,* 470 U.S. 1035 (1985)(§1983 liability clear where supervisor was deliberately indifferent in the face of a pervasive risk of harm and could be held liable under 1983 where the inaction bore an affirmative causal link to harm suffered by plaintiff).

A child while in school is deprived, at least temporarily, of the protection of his parents or guardian. Any protection afforded through parents is after-the-fact. Schools, on the other hand, have elaborate disciplinary measures and should have safe school plans to ensure school safety and protect students so that they can attend school to learn. Contrary to the Fourth Circuit's decision, the State's inaction can be the basis for liability according to the N.C. Supreme Court.

III. The Circuit Courts Of Appeal Have Struggled With Determining The Circumstances And Situations Where The State Can Be Held Liable For A Violation Of An Individual's Right To Bodily Integrity By Non-State Actors.

Although the circuit courts have uniformly rejected the "special relationship" theory of liability in the school context and agreed that there is no custodial relationship based on mandatory school attendance; there is conflict between the circuit courts are to what circumstances and situations outside the custodial relationship support State liability for the acts of third parties.[6] Some circuit courts have found violations of the

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[6] *J.O. v. Alton Community Unit School District 11*, 909 F.2d 267, 272 (CA7 1990) ("We do not suggest that prisoners and [involuntarily committed] mental patients are an exhaustive list of all persons to whom the state owes some affirmative duties, but the government, acting through local school administrations, has not rendered its schoolchildren so helpless that an affirmative constitutional duty to protect arises."); *see also, Leffall v. Dallas Independent School District*, 28 F.3d 521 (CA5 1994) (holding a school not liable when one student shot another at a school sponsored school dance); *Graham v. Independent School District No. I-89*, 22 F.3d 991 (CA10. 1994) (holding that a school cannot be liable, even for known or foreseeable hazards caused by third parties, because no custodial relationship existed); *Dorothy J. v. Little Rock School District*, 7 F.3d 729 (CA8 1993) (holding that mandatory school attendance is not sufficiently restrictive to trigger a duty to protect); *Maldonado v. Josey*, 975 F.2d 727 (CA10 1992) (holding that (continued...)

due process clause using the danger creation and deliberate indifference exceptions of *Canton*. Several courts of appeals have recognized the state-created danger theory, and utilized it to find a constitutional tort duty outside of a strictly custodial

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(...continued)
compulsory school attendance did not trigger a duty to protect students), *cert. denied*, 507 U.S. 914, 122 L. Ed. 2d 662, 113 S. Ct. 1266 (1993); *D.R. v. Middle Bucks Area Vocational Technical School*, 972 F.2d 1364, 1373 (CA3 1992) (*en banc*) (holding that "no special relationship based upon a restraint of liberty exists" in the context of public school attendance), *cert. denied*, 506 U.S. 1079, 122 L. Ed. 2d 354, 113 S. Ct. 1045 (1993). *But compare Leffall*, 28 F.3d at 529 (stating that school officials should be liable for violations of student's due process rights when the students were harmed not by classmates but by teachers or other school staff: "The special relationship doctrine is properly invoked in cases involving harms inflicted by third parties, and it is not applicable when it is the conduct of a state actor that has allegedly infringed a person's constitutional rights."); *Doe v. Taylor Independent School District*, 15 F.3d 443 (CA5 1993), *cert. denied sub nom Lankford v. Doe*, 130 L. Ed. 2d 25, 115 S. Ct. 70 (1994); *Fialkowski v. Greenwich Home for Children, Inc.*, 921 F.2d 459 (CA3 1990) (holding that a resident of a state home had no due process right to protection because he had been placed there at his parents' instance and was apparently free to leave); *and, Monahan v. Dorchester Counseling Center, Inc.*, 961 F.2d 987, 993 (CA1 1992) ("Although the Commonwealth may have played some role in the harm, it did so only because Monahan voluntarily availed himself of the Commonwealth service.... Thus, the Commonwealth's actions, while possibly negligent or even willfully indifferent or reckless, did not take on the added character of violations of the federal Constitution.") *with Buffington v. Baltimore County*, 913 F.2d 113, 119 (CA4 1990) ("Nothing in the [*DeShaney*] Court's rationale for finding that some affirmative duty arises once the state takes custody of an individual can be read to imply that the existence of the duty somehow turns on the reason for taking custody."), *cert. denied*, 499 U.S. 906, 113 L. Ed. 2d 216, 111 S. Ct. 1106 (1991) *and Kolpak v. Bell*, 619 F. Supp. 359, 378 (N.D. Ill. 1985) ("While the court need not consider the constitutional significance of a voluntary admission on this motion, there is much logic in the cases that find voluntary and involuntary residents entitled to the same constitutional rights to a safe environment."); *Spivey v. Elliott*, 29 F.3d 1522 (CA11 1994)(held that a residential student had a special relationship with the state triggering the state's duty to protect) *rev'd rehearing, Spivey v. Elliott*, 41 F.3d 1497 (CA11 1995).

context. *Wood v. Ostrander*, 879 F.2d 583 (CA9 1989), *cert. denied*, 111 S.Ct. 341 (1990); *and, Jackson v. City of Joliet*, 715 F.2d 1200, 1204 (CA7 1983).

Post-*DeShaney* courts have asked whether the state actors involved affirmatively acted to create a plaintiff's danger, or to render him or her more vulnerable to it. *See e.g., Bryson v. City of Edmond*, 905 F.2d 1386, 1392 (CA10 1990) (declining to impose liability upon state for deaths of post office employees shot by fellow worker where responding police did not create the dangerous situation nor act to worsen decedents' plights).

Yet, the circuit courts of appeal are struggling with the interpretation of these exceptions in cases seeking state liability for the actions of private parties. Although in this case, the Fourth Circuit rejected state liability under the danger creation theory because there was no custodial relationship, the Third, Fifth, Tenth and other Circuit Courts have reached different conclusions and have developed tests for determining state liability in similar circumstances.[7]

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[7] *Compare: Dwares v. City of New York*, 985 F.2d 94, 99 (CA2. 1993) (allowing recovery for injury that resulted from police indication to "skinheads" that they would not interfere if "skinheads" beat up flag-burning protesters because "the defendant officers indeed had made the demonstrators more vulnerable to assaults"); *Ross v. United States*, 910 F.2d 1422, 1431 (CA7. 1990) (allowing recovery for injury resulting from state prevention of private rescue attempt); *and Estate of Sinthasomphone v. City of Milwaukee*, 785 F. Supp. 1343, 1349 (E.D. Wis. 1992) (city increased vulnerability of boy when its officers threatened to arrest private citizens who wanted to intervene to protect the boy and then sent the boy back naked to Jeffrey Dahmer); *with, Salas v. Carpenter* , 980 F.2d 299, 309-10 (CA5. 1992) (no liability where city did not increase risk of harm to hostage by declining assistance from a SWAT team from another department and taking a hard line with hostage taker); *Jackson v. City of Joliet*, 715 F.2d 1200, 1204-1205 (CA7 1983) (no liability where "state officers did not create but merely failed to avert danger" by not promptly rescuing victims from burning car); *and, Rogers v. City of Port Huron* , 833 F. Supp. 1212, 1218-19 (E.D. Mich. 1993) (no liability where police did not increase danger to drunken man lying next to the road by refusing to assist him).

Third Circuit Court of Appeals – The *Kneipp* Test.

The Third Circuit found that there is no meaningful difference between a situation in which a teacher participates in the offensive act and in a situation in which the teacher chooses not to participate but stood by and encouraged the students to engage in the behavior nonetheless. *Fenstermaker v. Nesfedder,* 802 F. Supp. 1258 (E.D. Pa. 1992), *aff'd in part and vacated in part,* 9 F.3d 1540 (CA3 1993)(school liable when coach, who did not participate, stood by and allowed students to engage in hazing ritual).

Moreover, the Third Circuit adopted the "state-created danger" theory as a viable mechanism for establishing a constitutional violation. *Kneipp v. Tedder*, 95 F.3d 1199, 1205 (CA3 1996)(police liable for plaintiff's injuries when, after stopping severely inebriated woman, police allowed her to walk home alone and she suffered permanent brain damage after falling down an embankment). In *Kneipp,* the Third Circuit recognized four common elements in the test they developed for applying the state-created danger theory. The four elements of the *Kneipp* test are: 1. the harm ultimately caused was foreseeable and fairly direct; 2. the state actor acted in willful disregard for the safety of the plaintiff; 3. there existed some relationship between the state and the plaintiff; and, 4. the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur. *Id.* at 1208; *see also, Mark v. Hatboro*, 51 F.3d 1137, 1152 (CA3 1995).

The first prong of the *Kneipp* test requires a plaintiff to show the harm ultimately caused was foreseeable and a fairly direct result of the state actor's inaction. *See Morse v. Lower Merion School District*, 132 F.3d 902, 908 (CA3 1997). The second prong asks "whether the state actor acted with willful disregard for or deliberately indifferent to the plaintiff's safety ... in other words, the state action must evince a willingness to ignore a foreseeable danger or risk."

Morse, 132 F.3d at 910. The willful disregard analysis turns on the action that the school board took or failed to take after they became aware that a dangerous condition existed. The third and fourth prong required some type of relationship and the use of the state's authority to create an opportunity for the crime to occur. *Id.* at 1208.

Unlike the Fourth Circuit's ruling, the Third Circuit utilized the *Kneipp* test to find state liability when, through inaction, the state actors used their authority to create the situation that allowed a plaintiff to be injured.

Fifth Circuit Court of Appeals - Judge Parker's Test

According to the Fifth Circuit, the notion that individuals have a fundamental substantive due process right to bodily integrity is beyond debate, but it is also clear that the State owes no general affirmative duty to its citizens to ensure that their rights do not come to harm by other means. *Walton ex rel Walton v. Alexander*, 44 F.3d 1297, 1306 (Parker, J, concurring)(CA5 1995). What is not clear is how this Court should resolve the tension often created by the violation of the individual right to bodily integrity by non-state actors under circumstances where the State's role is not strictly a passive role. *Id.* at 1307. Under what, if any, circumstances other than the custodial context are students afforded constitutional protection? And what circumstances and situations invoke the school's affirmative duty to protect public school children?

To aid in answering those questions, Judge Parker proposed these factors to determine state liability: 1. the authority and discretion state actors have to control the environment and the behavior of the individuals in their custody; 2. the responsibilities assumed by the State; 3. the extent to which an individual in state custody must rely on the State to provide for his or her basic needs; and 4. the degree of control actually exercised by the State in a given situation. *Id.* at 1309-10. His test appears to combine the

concept of "special relationship" and danger creation theory. In fact, Judge Parker stated that "[i]t is clear that the *DeShaney* court did not foreclose 'special relationships' in all cases of non-incarcerated and non-institutionalized persons." *Id.* at 1307.

The concern expressed by the concurring judges in *Walton* with the majority's bright line rule requiring involuntary custodial relationship for invoking the State's duty to protect, was that:

> ...law abiding, tax paying citizens who because they may simply obeying the compulsory attendance laws or because they have no other economic choice deliver a child to the care, custody and control of the State, do so at their own risk. At the same time, those who find themselves in the care, custody, and control of the State because they are criminals are wrapped in the protective cloak of the constitution.

Id. at 1310.

The Fourth Circuit's reliance on the custodial relationship for invoking the state's obligation to protect schoolchildren means that schoolchildren are just as safe unattended on the street as they are in school.

Tenth Circuit Court of Appeals – *Armijo* Test

Reaching a different conclusion than the Fourth Circuit, the Tenth Circuit designed the *Armijo* test. *Armijo v. Wagon Mound Pub. Sch.*, 159 F.3d 1253, 1260 (CA10 1998). The *Armijo* elements for state liability are that: 1. the plaintiff was a member of a limited and specifically definable group; 2. the defendant's conduct put plaintiff at substantial risk of serious, immediate, and proximate harm;

3. the risk was obvious or known; 4. the defendant acted recklessly in conscious disregard of that risk; 5. such conduct, when viewed in total, is conscience shocking; and 6. the defendant actors created the danger or increased the plaintiffs' vulnerability to the danger in some way." *Id.* at 1262-63.

When developing the *Armijo* test, the Tenth Circuit relied on cases from the Fifth, Seventh, and Eighth Circuit and opined that:

> The key to the state-created danger cases . . . lies in the state actors' culpable knowledge and conduct in affirmatively placing an individual in a position of danger, effectively stripping a person of her ability to defend herself, or cutting off potential sources of private aid. Thus the environment created by the state actors must be dangerous; they must know it is dangerous; and, to be liable, they must have used their authority to create an opportunity that would not otherwise have existed for the third party's [acts] to occur.

Id.(quoting, Johnson v. Dallas Ind. Sch. Dist., 38 F.3d 198, 201 (CA5 1994); *see also Reed v. Gardner* , 986 F.2d 1122, 1126 (CA7 1993) (plaintiffs "may state claims for civil rights violations if they allege state action that creates, or substantially contributes to the creation of, a danger or renders citizens more vulnerable to a danger than they otherwise would have been"); *Freeman v. Ferguson*, 911 F.2d 52, 55 (CA8 1990)(*DeShaney* "establishes the possibility that a constitutional duty to protect an individual against private violence may exist in a non-custodial setting if the state has taken affirmative action which increases the individual's danger of, or vulnerability to, such violence beyond the level it would have been at absent state action.")).

Another recent Tenth Circuit decision on this issue is *Sutton v. School for the Deaf,* 173 F.3d 1226 (CA10 1999). Like the Stevensons, the *Sutton* plaintiffs claimed that defendants, acting as persons under color of state law, deprived their son, James, of "his rights, privileges and immunities secured by the Constitution by failing to protect him from assaults by another student." *Sutton, supra,* F.3d at 1230. More specifically, the Suttons alleged that by failing to adhere to school policy requiring the supervision of James and other students while in the restroom, defendants "created the danger" which ultimately led to the sexual assaults upon James. *Id.*

In deciding whether the Suttons had pled a cognizable Section 1983 claim, the Tenth Circuit first determined whether the Suttons could allege the deprivation of a constitutional right." *Graham v. Independent School Dist. No. I-89,* 22 F.3d 991, 993 (CA10 1994). In so doing, the Tenth Circuit agreed that it is well settled that a state does not have a constitutional duty to protect its citizens from private violence and are liable only for their own acts. *Sutton, supra,* at 1230. However, the school principal in *Sutton* had been informed of the physical assaults and failed to adopt or implement a policy of training to prevent violations of the student's rights. The Tenth Circuit accepted the Suttons' argument that a viable claim has been stated that the principal, with deliberate indifference, failed to adequately train school employees or adopt or implement a policy to prevent sexual assaults like those against James. *Id., see also, Green v. Branson*, 108 F.3d 1296, 1302-03 (CA10 1997); *Meade v. Grubbs*, 841 F.2d 1512, 1527-28 (CA10 1988); *Greason v. Kemp*, 891 F.2d 829, 837 (11th Cir. 1990) (supervisor liable for deliberate indifference to a mental patient's critical needs, with a resulting tragic suicide).

In summary, the Tenth Circuit along with the Third and Fifth Circuits have developed tests for state liability outside of the custodial relationship. Some circuit courts are

recognizing that the custodial relationship does not fit the situations and circumstances of today's student-school relationship and look to the danger creation and deliberate indifference theories for school liability. The Fourth Circuit reliance on the custodial relationship for school liability is misplaced. Moreover, the Fourth Circuit's acquiescence to the inaction of school officials in the face of known, ongoing, school violence is unconscionable and shocking.

CONCLUSION

Until this Court finally decides this issue, the circuit courts will continue to speculate on the proper interpretation of the exceptions found in *DeShaney* and *Canton.* Different tests for state liability are emerging without this Court's guidance. Now is the time for this Court to settle the conflict between the circuit courts and determine the circumstances and situations which warrant state liability for failing to protect the nation's schoolchildren.

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully Submitted,

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ALEX STEVENSON, by and through his father and next friend, Elmer William Stevenson; ELMER WILLIAM STEVENSON, on his own behalf,

Plaintiffs-Appellants,

v. No. 99-2685

MARTIN COUNTY BOARD OF EDUCATION; WILLIE C. PEELE, Superintendent of Martin County Schools, individually and in his official capacity; HARRY D. RESPASS, Principal of Williamston Middle School, individually and in his official capacity; SWANOLA CHANCE, teacher at Williamston Middle School, individually and in her official capacity,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of North Carolina, at New Bern.
Malcolm J. Howard, District Judge.
(CA-99-84-4-H3)

Argued: September 25, 2000
Decided: February 6, 2001
Entered: February 6, 2001

Before MICHAEL, MOTZ, and TRAXLER, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Robert John McAfee, MCCOTTER, MCAFEE & ASHTON, L.L.P., New Bern, North Carolina, for Appellants. Michael Crowell, THARRINGTON SMITH, L.L.P., Raleigh, North Carolina, for Appellees. **ON BRIEF:** Charles K. McCotter, Jr., MCCOTTER, MCAFEE & ASHTON, L.L.P., New Bern, North Carolina; Stacey B. Bawtinhimer, LAW OFFICE OF STACEY B. BAWTINHIMER, New Bern, North Carolina, for Appellants. Lisa Lukasik, THARRINGTON SMITH, L.L.P., Raleigh, North Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See
Local Rule 36(c).

OPINION

PER CURIAM:

Alex Stevenson, by his father, Elmer William Stevenson, and the senior Mr. Stevenson, on his own behalf, brought this action under 42 U.S.C. § 1983 against the Martin County Board of Education and several school officials. Alex alleged that the defendants violated his liberty interest in bodily integrity and his property interest in a public education when they allowed his classmates to physically assault him at school over a period of several weeks. Alex also alleged a violation of the Safe and

Drug-Free Schools and Communities Act as well as constitutional and common law claims under North Carolina law. The district court dismissed the complaint for failure to state a claim and declined to exercise supplemental jurisdiction over the state law claims. Because Alex has not alleged sufficient facts to hold the school board or its officials liable for federal constitutional violations and because a private right of action is not available under the Safe Schools Act, we affirm the dismissal of the federal claims. We also hold that the district court did not abuse its discretion in declining to exercise supplemental jurisdiction over the state law claims.

I.

The complaint sets forth a disturbing set of facts, which we take as true. In August 1998 ten-year-old Alex Stevenson began the sixth grade at Williamston Middle School in Martin County, North Carolina. He did not finish the year there, however. In November his father had to remove him from Williamston Middle School and enroll him in a private school because of the repeated assaults Alex suffered at the hands of several of his classmates.

The abuse started as soon as the school year began. On August 7, 1998, the second day of school, Alex's sixth-grade classmates Charles McEachern and Kemadrick Terrell Sherrod robbed and assaulted Alex in the lunch yard. Several days later on August 10 Sherrod threw books at Alex, and Sherrod was subsequently suspended. On August 20 McEachern picked a fight with Alex in retaliation for Sherrod's suspension. The school suspended both McEachern and Alex because of this fight.

On August 20 Alex's father, Elmer William Stevenson ("Stevenson"), met with the principal of Williamston Middle School, Harry Respass. At this meeting Stevenson told Respass that McEachern was threatening Alex, and he (Stevenson) expressed his concern that

McEachern and his friends would seek revenge on Alex. Stevenson then requested that the school remove Alex from McEachern's classes. Although Respass assured Stevenson that the boys would be placed in separate classes, this was not done.

For the next month (from mid-August to mid-September) McEachern continued to harass and intimidate Alex. As he walked past Alex's locker, McEachern would hit and kick Alex in the head, chest, and back. Alex and his father complained to Principal Respass and school counselor Babbie Mills about these assaults, but McEachern was neither disciplined nor removed from Alex's classes.

The situation reached a new low on September 18. Alex and McEachern were in Swanola Chance's first-period art class, and McEachern wrongly accused Alex of breaking his glasses. When Alex denied it, McEachern began to punch Alex in the head. Alex temporarily escaped from the attack and asked Chance for help, but she responded, "There isn't anything I can do." She added, "You probably deserved it anyway." Because he was receiving no help from Chance, Alex told her that he was going to the principal's office. McEachern and a friend, Broderick Jones, followed Alex out of the classroom and chased him down the hallway. They knocked Alex to the floor, and for about ten minutes proceeded to punch and kick him in the head, throat, chest, arms, and legs. Adele Dees, a teacher in a nearby classroom, tried to stop McEachern and Jones, but they assaulted her as well. Several students eventually restrained the two attackers.

McEachern and Jones were suspended, and for several weeks they attended a school for students with disciplinary problems. Principal Respass did not, however, report the assaults to the juvenile authorities. On September 21 Stevenson filed juvenile petitions against McEachern and Jones, alleging assault with infliction of serious bodily injury. In January 1999 McEachern and Jones admitted the

charges and received sentences of twelve-months probation and community service.

While the juvenile proceedings were pending, the assaults on Alex continued. On September 22 three of McEachern's friends threatened Alex during his first-period class. Alex promptly reported the threats to Principal Respass, but that did not prevent McEachern and his friends from assaulting Alex later in the day during lunch. One of the lunchtime attackers was suspended from school. On September 25 McEachern and several of his friends harassed Alex and his father while they were at a music festival in Williamston. The police intervened and escorted McEachern from the scene. Stevenson finally decided that because of the assaults and harassment, Alex would have to transfer to private school.

Alex suffered physical and emotional problems because of the repeated assaults and harassment. After the September 18 assault a doctor treated him for contusions, lacerations, and temporary eye dysfunction. A psychologist diagnosed Alex with major depression and attention deficit/hyperactivity disorder, and Alex began taking medication. He continues to receive counseling for his psychological problems.

Alex, through his father as next friend, and his father sued the Martin County Board of Education, Superintendent Willie Peele, Principal Respass, and Chance (the teacher) under 42 U.S.C.§ 1983 and state law. Alex alleged that by failing to prevent McEachern and his fellow ruffians from attacking Alex, the defendants deprived him of his liberty interest in bodily integrity and his property interest in a public education, in violation of the Due Process Clause of the Fourteenth Amendment. See U.S. Const. amend. XIV, § 1. Alex also alleged that the defendants violated the Safe and Drug-Free Schools and Communities Act of 1994, 20 U.S.C. § 7101-7104, 7111-7143. The state law counts asserted claims of negligence, assault, negligent infliction of emotional distress, and violations of the North Carolina

Constitution and the North Carolina Safe Schools Act. The district court granted the defendants' motion to dismiss, disposing of the federal claims under Fed. R. Civ. P. 12(b)(6) and the state law claims under 28 U.S.C. § 1367(c)(3). Alex and his father appeal.

II.

We review de novo a grant of a motion to dismiss under Fed. R. Civ. P. 12(b)(6), "accepting as true the well-pleaded facts in the complaint and viewing them in the light most favorable to the plaintiff." Brooks v. City of Winston-Salem, 85 F.3d 178, 181 (4th Cir. 1996). Because this is a civil rights case, we are also guided by the following additional principles. In testing the sufficiency of a civil rights complaint, "we must be especially solicitous of the wrongs alleged," and we "must not dismiss the complaint unless it appears to a certainty that the plaintiff would not be entitled to relief under any legal theory which might plausibly be suggested by the facts alleged." Edwards v. City of Goldsboro, 178 F.3d 231, 244 (4th Cir. 1999) (quoting Harrison v. United States Postal Serv., 840 F.2d 1149, 1152 (4th Cir. 1988)) (internal quotation marks and emphasis omitted). Furthermore, "claim[s] under the Fourteenth Amendment merge[] into [a] § 1983 claim because § 1983 merely creates a statutory basis to receive a remedy for the deprivation of a constitutional right." Hughes v. Bedsole, 48 F.3d 1376, 1383 n.6 (4th Cir. 1995). Finally, we must keep in mind the difference between individual-capacity and official capacity suits under § 1983. A suit against a government official in his individual capacity for deprivation of federal rights seeks to impose personal liability upon the official. See Kentucky v. Graham, 473 U.S. 159, 165 (1985). In contrast, a suit against a government official in his official capacity is treated as a suit against the government entity of which the official is an agent. See id. at 165-66. Local government units are liable only if an official's execution of

a municipal policy, practice, or custom caused the injury. See Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978).

Reading the complaint with these principles in mind, we conclude that Alex intended to make the following three § 1983 claims; first, that Peele, Respass, and Chance deprived him of his constitutional property interest in a public education because the continued attacks forced him to leave Williamston Middle School; second, that the school officials deprived him of his constitutional liberty interest in bodily integrity by failing to stop the attacks by his fellow students; and third, that the Martin County Board of Education contributed to the violence by failing to develop appropriate school safety plans and by failing to train its school personnel in how to respond to violent students.

A.

Alex's first § 1983 claim is that the defendants deprived him of his property in violation of the Due Process Clause. When school officials suspend or expel a student, it triggers the student's property interest in a public education. See Goss v. Lopez, 419 U.S. 565, 572-76 (1975). However, a student is not deprived of his property interest when school officials engage in conduct such as reasonable corporal punishment, even though it has "the unintended effect of temporarily removing a child from" class. See Ingraham v. Wright, 430 U.S. 651, 674 n.43 (1977). In this case, Williamston Middle School officials did not suspend or expel Alex. Alex's father voluntarily withdrew Alex from school.

Alex argues, however, that the school "constructively expelled" him by fostering a climate of violence. Even though Alex failed to raise this argument to the district court, "we may consider such an issue if the error is `plain' and our refusal to consider it would result in a miscarriage of

justice." Nat'l Wildlife Fed'n v. Hanson, 859 F.2d 313, 318 (4th Cir. 1988).

Alex's constructive expulsion argument is a novel theory that has not yet been accepted by any court. It is inspired by constructive discharge cases arising under the employment laws. These cases hold that an employer constructively discharges an employee when the employer "deliberately makes an employee's working conditions intolerable and thereby forces him to quit his job." Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985) (internal quotation marks and citations omitted); see also Munday v. Waste Mgmt. of N. Am., Inc., 126 F.3d 239, 244 (4th Cir. 1997); Martin v. Cavalier Hotel Corp., 48 F.3d 1343, 1353-55 (4th Cir. 1995). In the school violence context, the theory would mean that a student's property interest in public education is triggered when school officials deliberately make the learning environment so dangerous or intolerable that the student is forced to transfer to another school.

The question of whether we should accept the constructive expulsion theory is purely academic, however, because Alex's complaint does not allege sufficient facts to support the theory. There is no allegation that the school officials acted deliberately to force Alex out of Williamston Middle School or that they singled him out in their failure to control the hooliganism. In fact, the school took some steps, although without success, to remedy the problem. Moreover, because of the novelty of the theory, it cannot be plain error for the district court to conclude that the school officials did not deprive Alex of a property interest in public education when he voluntarily withdrew from school.

B.

Alex's second § 1983 claim is that the defendants violated his liberty interest in bodily integrity. In this case, the perpetrators of the attacks against Alex were private

individuals, not the school officials. The law is clear that "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 197 (1989). There are, however, two exceptions to this general rule.

First, if the state has a special relationship with an individual, the state has an affirmative duty to protect the individual from harm inflicted by third parties. The Supreme Court has defined a "special relationship" in the following way:

> [W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs -- e.g., food, clothing, shelter, medical care, and reasonable safety -- it transgresses the substantive limits on state action set by . . . the Due Process Clause
>
> . . . . [I]t is the State's affirmative act of restraining the individual's freedom to act on his own behalf -- through incarceration, institutionalization, or other similar restraint of personal liberty -- which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

Id. at 200. Several circuits have been faced with the issue of whether a school-student relationship is a special relationship triggering the protections of the Due Process Clause. They have held uniformly that no special relationship exists because the student is not in physical custody and, along with parental help, is able to care for his basic human needs.

See Doe v. Hillsboro Indep. Sch. Dist., 113 F.3d 1412, 1415 (5th Cir. 1997) (en banc); Doe v. Claiborne County, 103 F.3d 495, 510 (6th Cir. 1996); Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729, 732 (8th Cir. 1993); Maldonado v. Josey, 975 F.2d 727, 731 (10th Cir. 1992); D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1372 (3d Cir. 1992) (en banc); J.O. v. Alton Cmty. Unit Sch. Dist. 11, 909 F.2d 267, 272 (7th Cir. 1990). This circuit has also recognized that "incarceration, institutionalization, or the like" is needed to "trigger the affirmative duty" under the Due Process Clause. Pinder v. Johnson, 54 F.3d 1169, 1175 (4th Cir. 1995) (en banc).

Following the lead of our sister circuits, we hold that the Martin County School officials did not have a "special relationship" with Alex that triggered the protections of the Due Process Clause in this case. When a student attends public school, his liberty is not restrained to the extent contemplated in DeShaney. Attending school is not the equivalent of incarceration or institutionalization. See Youngberg v. Romeo, 457 U.S. 307 (1982) (Fourteenth Amendment imposes a duty upon the state to protect involuntary committed, mentally ill patients); Estelle v. Gamble, 429 U.S. 97 (1976) (the state's deliberate indifference to prisoners' medical needs violates the Eighth Amendment). Although a student must remain in school during the day and the school functions much as a parent during that time, the state has not assumed total responsibility for the student's care. The student's parents retain the ability to provide for his basic human needs, and the child remains free to seek their help and protection. See Claiborne County, 103 F.3d at 509-10; D.R. , 972 F.2d at 1371-73. Therefore, the state, simply by virtue of its maintenance of a public school system, does not become constitutionally liable for failing to prevent all student-on-student violence. Although the school officials here may have been irresponsible and ineffective in not

heeding the warnings that Alex was helpless at the hands of bullies, they have not committed a constitutional violation.

The second exception to the general rule that a state is not liable for the acts of third parties occurs when the state itself creates the danger. See DeShaney, 489 U.S. at 201. In order to create a danger, the state has to take some affirmative steps. Liability does not arise when the state stands by and does nothing in the face of danger. See id. at 203. Failing to provide protection from danger does not implicate the state in the harm caused by third parties. See Pinder, 54 F.3d at 1175.

In Pinder this court was faced with a case in which it had to decide the contours of DeShaney's state-created danger exception. Pinder's ex-boyfriend, Pittman, broke into her home, assaulted her, and threatened to kill her and her three children. Pinder called the police, and when an officer arrived, she told him about the attack and the threats. The officer arrested Pittman and assured Pinder that she could safely leave her children at home alone while she went to work because Pittman would be in custody. However, because the police charged Pittman with misdemeanor offenses, he was released almost immediately. While Pinder was at work, Pittman set fire to her house, killing her three children who were asleep. Pinder sued the arresting officer, claiming that he had created the danger. See id. at 1172. This court dismissed her suit because it was "purely an omission claim" where all that could be said was that the officer "'stood by and did nothing when suspicious circumstances dictated a more active role.'" Id. at 1175 (quoting DeShaney, 489 U.S. at 203). The state's conduct was not on that "point on the spectrum between action and inaction" such that it was implicated in the injury. Id.

The facts in DeShaney are equally disturbing. Randy DeShaney beat his four-year-old son Joshua so severely that Joshua suffered permanent brain damage. This tragic incident came after the Winnebago County Department of Social Services (DDS) in Wisconsin had been informed of

child abuse. In fact, DDS had obtained a court order placing Joshua in the temporary custody of a hospital after DeShaney's beatings put Joshua there, but thereafter DDS released Joshua into his father's custody. Caseworkers had also made monthly visits to the DeShaney home, in which they observed suspicious injuries on Joshua's body. See DeShaney, 489 U.S. at 192-93. The Court nevertheless held that the state was not liable for a constitutional violation. The facts only amounted to a failure of the DDS to protect Joshua from private violence and the state had no constitutional duty to protect Joshua. See id. at 202-03.

Given the rejection of the plaintiffs' § 1983 claims in DeShaney and Pinder, we have to conclude in this case that the school officials did not create the danger that Alex faced at the hands of his classmates. In fact, the school did more than just stand by while Alex was being brutalized. The school took some measures to remedy the situation. Principal Respass met with Alex's father to discuss the problem. In addition, the school suspended McEachern twice and eventually sent him to a special disciplinary program. Two other attackers, including Jones, were also suspended. The school surely could have done more to protect Alex, given the frequent and brutal attacks by McEachern and others. But the failure to protect by itself is not sufficient to trigger constitutional liability in this situation.

Furthermore, in the school violence context, some courts have required that school officials must act with deliberate indifference before there is liability for student-on-student attacks. See Sutton v. Utah State Sch. for the Deaf & Blind, 173 F.3d 1226, 1238 (10th Cir. 1999); Leffall v. Dallas Indep. Sch. Dist., 28 F.3d 521, 531 (5th Cir. 1994). These courts have said that the school must engage in intentional or reckless affirmative conduct that shocks the conscience of federal judges. See Sutton, 173 F.3d at 1238-39. Alex has not alleged that the school officials intentionally or recklessly took steps to contribute to the violence. Teacher Chance's response when Alex reported

being punched in the head does not amount to deliberate indifference when considered in context. Chance said, "There isn't anything I can do. You probably deserved it anyway." This statement appears to express frustration and resignation more than anything else. While Chance might have tried harder to help Alex, this does not mean that she deprived Alex of his constitutional rights.

For all of the above reasons, this case does not fall into the state-created danger exception to DeShaney.

C.

Alex's final § 1983 claim is against the Martin County Board of Education. He alleges that the board was responsible for his brutalization because it failed to develop adequate school safety plans and failed to train teachers and administrators in proper techniques for controlling violence in school. Local government units are subject to § 1983 liability for the unconstitutional acts of their employees when the employee acts pursuant to a municipal policy, practice, or custom. See City of Oklahoma City v. Tuttle, 471 U.S. 808, 818-19 (1985); Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978). In addition, a municipal entity can be liable if its failure to train its employees leads to some unconstitutional conduct. See City of Canton v. Harris, 489 U.S. 378, 388 (1989). The failure to train must amount to "deliberate indifference to the rights of persons with whom [the employees] come into contact." Id.

We do not have to reach the question of whether the school official's conduct in this case arose from a municipal policy or custom, nor do we have to determine whether the board's failure to train the teachers and administrators amounted to deliberate indifference. An award of damages against a municipality based on the actions of its officers is not available unless the officers' conduct amounted to a constitutional injury. See City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986) ("[N]either Monell . . . nor any other of

our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm."); S.P. v. City of Takoma Park, 134 F.3d 260, 274 (4th Cir. 1998) (a municipality "necessarily is not liable for any alleged injuries" where "no constitutional violation occurred"); Belcher v. Oliver, 898 F.2d 32, 36 (4th Cir. 1990) ("Plaintiff's effort to turn this lawsuit into one for inadequate training of personnel . . . is unavailing where there has been no underlying constitutional infraction."). Because we have already determined that Alex's allegations do not amount to a§ 1983 violation on the part of the school officials, it follows that the school board like-wise cannot be held constitutionally liable.

III.

Alex also argues that the defendants violated the Safe and Drug Free Schools and Communities Act of 1994 (Safe Schools Act), 20U.S.C. §§ 7101-7104, 7111-7143, by failing to develop an appropriate school safety plan that would help control student-on-student violence. The Safe Schools Act is a federal grant program that aims to prevent violence and drug abuse in schools. These goals are accomplished through federal assistance to states so that they can make grants to local educational agencies and community organizations. Federal money also goes to fund private, non-profit organizations and colleges and universities that develop anti-violence and anti-drug initiatives. See 20 U.S.C. § 7103. The Act does not expressly create a private right of action. Therefore, we must determine whether Alex has an implied right to maintain a Safe Schools Act claim.

In answering this question, we must first decide if the Act grants Alex any substantive rights. For a person to bring a claim under conditional spending legislation, the statute must confer substantive rights in favor of the class to which the person belongs. See Pennhurst State Sch. & Hosp. v.

Halderman, 451 U.S. 1 (1981). Substantive rights are created only if Congress provided the recipients of federal funding clear notice that by accepting funds, they have chosen to participate in a statutory scheme under which private individuals gain enforceable rights. See id. at 24-25. Because the Safe Schools Act was enacted pursuant to the Spending Clause, Alex's claim will be allowed only if the statute puts funding recipients on notice of a private right of action.

Stevenson relies on Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999), to argue that the Safe Schools Act puts schools receiving federal funds on notice that their students can sue them for failing to implement school safety plans. In Davis the plaintiff, on behalf of her minor daughter, sued a school board under Title IX of the Education Amendments Act of 1972, see 20 U.S.C. §§ 1681-1688, after her daughter was sexually harassed by one of her classmates when she was in fifth grade. The plaintiff alleged that the school failed to take any measures against the harasser even though her daughter repeatedly reported the incidents to teachers and to the principal, asking them for help. See id. at 633-35. The Court held that Title IX supported a private damages action against a school for severe student-on-student harassment because the statutory scheme put schools on notice that they could be held liable for their failure to respond to students' discriminatory acts, if the failure amounted to deliberate indifference. The Court pointed to the language of the statute itself, which makes schools liable if they subject persons to discrimination under their programs or activities or deny students educational benefits. In addition, the Court relied on the fact that the Department of Education had promulgated regulations requiring recipients of federal funds to monitor third-party discrimination. See id. at 643-45. The Court added that the common law puts schools on notice because it allows "claims alleging that schools have been negligent in failing to protect their students from the torts of their peers." Id. at 644.

Unlike Title IX, the Safe Schools Act does not put schools on notice that they can be sued for failing to implement anti-violence programs. Alex has not pointed to anything in the language or purpose of the Act that would suggest otherwise. The Department of Education has not promulgated any regulations pursuant to the Act.

Furthermore, no court has held that the Safe Schools Act creates a private right of action in any situation, whereas for Title IX, it had already been established before Davis that Title IX creates a cause of action for damages when the school officials themselves engage in the discriminatory conduct. See Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60 (1992); Cannon v. University of Chicago, 441 U.S. 677 (1979).

The fact that the common law might allow suits against schools for student-on-student violence does not help Stevenson either. The Court in Davis placed little, if any, emphasis on the common law in reaching the conclusion that Title IX gave schools notice of a private right of action for student-on-student harassment. It only mentioned the common law after discussing the language, purpose, and regulations of Title IX. There is nothing in Davis to suggest that the common law alone could put the recipient of federal funds on notice that a Spending Clause statute creates a private right of action. We hold that because the Safe Schools Act does not put schools on notice of the creation of an enforceable substantive right, Alex cannot bring a Safe Schools Act claim.

IV.

Alex also brought several state law claims against the defendants, alleging negligence, assault, and negligent infliction of emotional distress, violations of North Carolina's constitutional right to an education, N.C. Const. art. 1, § 15, art. 9, § 2, and violations of the North Carolina Safe Schools Act, N.C. Gen. Stat. § 115C-105.45. Once the

district court dismissed the federal claims, it exercised its discretion to decline supplemental jurisdiction over the state claims. See 28 U.S.C. § 1367(c). We review a district court's decision not to exercise supplemental jurisdiction for abuse of discretion. See Jordahl v. Democratic Party of Va., 122 F.3d 192, 203 (4th Cir. 1997). The district court did not abuse its discretion in this case. It made a prudent decision in light of the fact that Stevenson had not stated a claim under § 1983.

V.

To summarize, we hold that all three of Stevenson's§ 1983 claims were properly dismissed under Fed. R. Civ. P. 12(b)(6). The school officials did not deprive Alex of his property interest in a public education because they did not expel or suspend him. The officials likewise did not deprive him of his liberty interest in bodily integrity because they did not prevent him from taking care of himself, nor did they create the dangerous situation he found himself in. The school board cannot be held liable where there was no underlying constitutional violation. We also hold that there is no private right of action under the Safe and Drug-Free Schools and Communities Act, nor is it possible to assert the statutory claim through§ 1983 because the Act does not put schools on notice that they are open to suit by private parties. Finally, the district court did not abuse its discretion in declining to exercise supplemental jurisdiction over the state law claims. The judgment is affirmed.

AFFIRMED

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA,
EASTERN DIVISION

ALEX STEVENSON, by and through his father and next friend, ELMER WILLIAM STEVENSON, and ELMER WILLIAM STEVENSON on his own behalf,

Plaintiffs,

v. NO. 4:99-CV-84-H(3)

MARTIN COUNTY BOARD OF EDUCATION, and WILLIE C. PEELE, Superintendent of Martin County Schools, individually and in his official capacity, HARRY D. RESPASS, Principal of Williamston Middle School, individually and in his official capacity, and SWANOLA CHANCE, teacher at Williamston Middle School, individually and in her official capacity,

Defendants.

November 12, 1999, Decided
November 15, 1999, Filed
November 15, 1999, Entered

DISPOSITION:

[**1] Defendants' motion to dismiss GRANTED and plaintiffs' motion to strike moot.

COUNSEL:

For ALEX STEVENSON, ELMER WILLIAM STEVENSON, plaintiffs: Charles K. McCotter, Jr., Robert J. McAfee, McCotter, McAfee & Ashton, New Bern, NC. For ALEX STEVENSON, ELMER WILLIAM STEVENSON, plaintiffs: Stacey B. Bawtinhimer, New Bern, NC.

For MARTIN COUNTY BOARD OF EDUCATION, WILLIE C. PEELE, HARRY D. RESPASS, SWANOLA CHANCE, defendants: J. Michael Crowell, Tharrington Smith, Raleigh, NC.

JUDGES:

MALCOLM J. HOWARD, United States District Judge.

OPINION BY:

MALCOLM J. HOWARD

OPINION:

[*645]

ORDER

CIV OB # 62, p.23

This matter is before the court on defendants' motion to dismiss plaintiffs' complaint pursuant to Fed. R. Civ. P. 12(b)(6) and 12(b)(1). Plaintiffs have responded and moved to strike certain portions of defendants' motion. This matter is ripe for ruling.

STATEMENT OF THE FACTS

Plaintiff, Alex Stevenson ("Alex"), attended the sixth grade at Williamston Middle School in Martin County, North Carolina, from August through October 1998. Alex asserts in his complaint that during the first two months of school, he was robbed during lunch, assaulted during his first period art class, repeatedly harassed [**2] and threatened by a fellow student and that student's friends on the school campus during school hours, and assaulted during first period while in the school hallway. Plaintiffs allege that the final assault upon Alex caused him physical damage and the combination of taunting and assaults caused him mental suffering.

On the second day of school in August 1998, Charles McEachern ("Charles") and his friend Kemadrick Sherrod ("Terrell") robbed and assaulted Alex in the school lunch yard. (Compl. P 15). Terrell was suspended the following week for throwing books at Alex. (Compl. 16). On August 20, 1998, Charles started a fight with Alex in defendant Swanola Chance's ("Chance") room. Alex defended himself during the fight and both Alex and Charles were suspended for two days. (Compl. PP 17-18). [*646]

Also on August 20, 1998, plaintiff Elmer Stevenson, Alex's father, attended a conference with the school principal and defendant, Harry Respass ("Respass"). Elmer Stevenson expressed his concern that Charles and his friends may seek revenge on Alex and informed Respass of Charles' threats against Alex. Respass assured Elmer Stevenson that he would remove Alex from Charles' classes to avoid a confrontation [**3] or retaliation. (Compl. P 20). On August 24, Charles was still in school, having not been suspended due to his parent's inability to arrange child care. (Compl. P 22). Charles told Alex that he was going to beat Alex up for Alex's role in getting Charles suspended. (Compl. P 21). Charles was eventually suspended, but Alex was not removed from any of Charles' classes.

From August 20 to September 18, 1998, Charles continued to harass Alex and would hit and kick Alex in the head, chest and back as he walked past Alex's locker. (Compl. P 27). On September 18, 1998, Charles accused Alex of breaking his glasses. (Compl. P 31). Alex denied this accusation and Charles punched him in the head. After being punched, Alex approached Chance, the teacher present in the room, and asked for help. (Compl. P 33). Chance told Alex that there was nothing she could do for him and that he probably deserved what he got. (Compl. P 34).

Alex told Chance that he was going to the principal's office for help. As Alex was going down the hall, Charles and a friend, Broderick Jones, walked past Chance and chased Alex. (Compl. P 38). Realizing that he was being chased, Alex tapped on the door of the music teacher. [**4] While in the hallway, Charles and Broderick overtook Alex and began to punch him. (Compl. P 40). They knocked Alex to the floor and began kicking and stomping on Alex's chest, throat, head, arms and legs for approximately 10 minutes. (Compl. P 40). The music teacher tried to stop Charles, but was herself assaulted. (Compl. P 41). Several students finally restrained Charles, but Broderick, who at the time weighed nearly 200 pounds, continued to stomp on Alex's throat until being restrained. (Compl. PP 43-45). The music teacher commented to Elmer Stevenson that the attack had been the most brutal she had ever witnessed. (Compl. P 47). Alex suffered severe contusions, lacerations and temporary eye dysfunction. (Compl. P 49). The school suspended Charles and Broderick and for several weeks, sent them to a separate school for students with disciplinary problems. (Compl. P 51).

On September 22, while in Chance's room, some of Charles' friends told Alex they were going to jump him. (Compl. P 54). Alex informed Respass, who told Alex that he would take care of it. (Compl. 55). The boys assaulted Alex after lunch and one of them was suspended. (Compl. P

56). On October 1, 1998, Elmer Stevenson [**5] withdrew Alex from Williamston Middle School.

Plaintiffs filed this action in June 1999, alleging numerous state claims along with federal claims under the Fourteenth Amendment and 42 U.S.C. § 1983. Defendants have moved to dismiss the federal claims and the pendent state claims.

COURT'S DISCUSSION

I. Standard of Review

A federal district court confronted with a motion to dismiss for failure to state a claim should view the allegations of the complaint in the light most favorable to the plaintiffs. See Ibarra v. United States, 120 F.3d 472, 474 (4th Cir.1997). The intent of Rule 12(b)(6) is to test the sufficiency of a complaint; "importantly, [a Rule 12(b)(6) motion] does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses."Edwards v. City of Goldsboro, 178 F.3d 231, 243 (4th Cir. 1999) (citing Republican Party v. Martin, 980 F.2d 943, 952 (4th Cir.1992). After accepting all well-pleaded [*647] allegations in the plaintiffs' complaint as true and drawing all reasonable factual inferences from those facts in the plaintiffs' favor, motions to dismiss [**6] are granted only where the plaintiffs can prove no set of facts which would entitle them to relief. See Mylan Lab. Inc. v. Matkari, 7 F.3d 1130 (4th Cir. 1983).

II. Plaintiffs' Constitutional Claims

The court must decide whether the disturbing events of Alex's first two months of school amount to a violation of his rights under the United States Constitution. For the reasons stated below, the court finds that they do not.

Before examining portions of the large body of case law dealing with violence in the school, it is important to determine what plaintiffs' claims allege. Plaintiffs have alleged two federal law claims against state actors. The first is a claim under the Fourteenth Amendment to the United States Constitution against defendants Martin County Board of Education, Peele, Respass and Chance, for deprivation of property without due process of law. The second is an untitled claim under § 1983 against Martin County Board of Education, Peele and Respass.

The United States Constitution and its amendments do not create private rights of action, but instead enable the branches of government to enact laws to enforce the articles or amendments. The [**7] Fourteenth Amendment prohibits the deprivation of property, see U.S. Const. amend XIV, @ 1, and gives Congress the power to enforce the provisions of the Fourteenth Amendment by appropriate legislation. See id. at @ 5. Congress has used the power delegated by the Constitution and its amendments to enact 42 U.S.C. § 1983 which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. ...

42 U.S.C. § 1983. Section 1983 provides the mechanism by which an [**8] individual may bring a cause of action against a state actor for a deprivation of a constitutional right or a right guaranteed by laws of the United States.

Plaintiffs' § 1983 claim alleges the deprivation of a right under to a public education and impliedly alleges deliberate indifference to a known duty under Title IV of the Safe and Drug-Free Schools Act ("Safe Schools Act"). Plaintiffs' due process claim is also asserted against state actors and must be brought under § 1983. Accordingly, plaintiffs' due process claim merges with plaintiffs' § 1983 claim. See Hughes v. Bedsole, 48 F.3d 1376, 1383 n.6 (4th Cir. 1995). The court will examine each of plaintiffs' federal claims under the §1983 rubric.

A. Plaintiffs' Due Process Claim

It is important to note that plaintiffs have not alleged a deprivation of a liberty interest, but instead, have alleged a deprivation of property. See Compl. P 82 ("Defendants ... arbitrarily and capriciously deprived Alex Stevenson of his property interest to public education with [sic] due process of law in violation of Fourteenth Amendment ..."). Plaintiffs attempt to argue in their brief that Alex was also deprived [**9] of a liberty interest guaranteed by the due process clause. However, plaintiffs have failed to allege the deprivation of a liberty interest. While never addressed by the Fourth Circuit, other circuits have uniformly rejected the position that a student is entitled to affirmative protection, under a due process [*648] liberty interest, while at school. See Johnson v. Dallas Indep. Sch. Dist., 38 F.3d 198 (5th Cir. 1994); Maldonado v. Josey, 975 F.2d 727, 730-33 (10th Cir.1992), cert. denied, 507 U.S. 914, 122 L. Ed. 2d 662, 113 S. Ct. 1266 (1993); Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729, 732 (8th Cir.1993); D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1369-72 (3rd Cir.1992) (en banc), cert. denied, 506 U.S. 1079, 122 L. Ed.

2d 354, 113 S. Ct. 1045 (1993); J.O. v. Alton Community Unit Sch. Dist. 11, 909 F.2d 267, 272 (7th Cir.1990). An affirmative duty only arises when "the state has exercised its power so as to render an individual unable to care for himself or herself."Alton Community, 909 F.2d at 272; see also Sutton v. Utah State Sch. for the Deaf and Blind, 173 F.3d 1226 (10th Cir. 1999). [**10]

The court agrees with the analysis of the Seventh Circuit in Alton Community regarding compulsory school attendance laws and the state's affirmative duty in school settings. The Seventh Circuit recognized that, for due process purposes, no special relationship exits between students and the school, stating that:

> The government, acting through local school administrations, has not rendered its schoolchildren so helpless that an affirmative constitutional duty to protect arises. Whatever duty of protection does arise is best left to laws outside the Constitution ... At most, the state might require a child to attend school ... but it cannot be suggested that compulsory school attendance makes a child unable to care for basic human needs. The parents still retain primary responsibility ...

Id.

While a right to public education is not enumerated in the Constitution, the Supreme Court has found that a student has a property interest in receiving a public education subject to the due process clause when a state establishes and maintains a public school system. See Goss v. Lopez, 419 U.S. 565, 574, 42 L. Ed. 2d 725, 95 S. Ct. 729 (1975). The [**11] student's due process right applies to the state's ability to take away the entitlement to education when dismissing a child. The court has been unable to find any case in which

the property right to public education has been applied in any circumstance other than a school dismissing or punishing a student, and plaintiffs have provided no such cases. Because Alex voluntarily left the public school to attend a private school, he cannot state a claim for deprivation of a due process property interest.

B. Plaintiffs' Deliberate Indifference Claims

Next, plaintiffs assert that defendants denied Alex the right to a public school education by their deliberate indifference to Alex's safety in violation of North Carolina law and the federal Safe Schools Act. Plaintiffs rely on the recent ruling of Davis v. Monroe County Board of Educ., 526 U.S. 629, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999), to support their contention that school officials who are deliberately indifferent have a duty to protect students from acts of private violence. The Davis decision examined Title IX, a law passed in 1972, with a regulatory scheme that "has long provided funding recipients [**12] with notice that they may be liable for their failure to respond to discriminatory acts of certain non-agents." Davis, 119 S. Ct. at 1671. The Court borrowed the deliberate indifference standard from § 1983 and applied it to a school board with knowledge of Title IX and its regulatory progeny. See id. at 1661. The Court concluded that the deliberate indifference standard and the language of Title IX may sometimes trigger a funding recipient's duty to respond to acts of third parties. See id. at 1672.

A funding recipient must have notice of their potential liability for student-on-student violence. See Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1, 17, 67 L. Ed. 2d 694, 101 S. Ct. 1531 (1981). The question in this case is whether defendants had notice of a duty to respond under the Safe Schools Act. If defendants had notice of a duty then plaintiffs' allegations [*649] of deliberate indifference could state a claim for relief.

Congress enacted the Safe Schools Act in 1994. Since its enactment, no regulations have been promulgated by the Department of Education explaining a students' rights under the Safe Schools Act, and no federal court [**13] in the country has relied upon the Act for any purpose. The Safe Schools Act is merely a grant program, with a stated purpose to "support grant programs to meet the seventh National Education Goal by preventing violence in and around schools ... through the provision of Federal assistance to ... States for Grants ..." 20 U.S.C. § 7103. To contend that this act placed defendants on notice that they could be held liable for student on student violence is severely misplaced.

The Supreme Court, in an attempt to add more weight to its decision in Davis, expressed the opinion that the common law also puts schools on notice for possible liability under state law for acts of third parties. See Davis, 119 S. Ct. at 1671. The premise upon which the Court made this statement was that explicit language existed in Title IX putting recipients of federal funding on notice that they could be held liable for discrimination. Defendants in Davis contended that although explicit language informed them of their liability, they were not on notice for possible third-party liability. However, the common law does not provide notice that schools may be held [**14] liable under a federal grant program containing no explicit language of recipient liability and no regulatory scheme creating liability. Accordingly, the court finds that plaintiffs have failed to state a claim for relief. Defendants had no notice that they could be liable under the Safe Schools Act for their own violent acts or the violent acts of their employees, let alone the implied notice that they could be held liable for third-party acts. Although the violence experienced by Alex is infelicitous, it does not rise to a federal constitutional or statutory violation. Defendants' motion to dismiss plaintiffs' federal claims is GRANTED.

IV. Plaintiffs' State Claim

The only remaining claims before this court are plaintiffs' claims under state law. The court's exercise of jurisdiction over such claims is discretionary, and a district court may decline to exercise supplemental jurisdiction over a claim "if [it] has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). Since the court in this case has dismissed plaintiffs' claims under federal law, it declines to exercise supplemental jurisdiction over their state [**15] law claim. Therefore, the court GRANTS defendants' motion to dismiss plaintiffs' state law claims.

CONCLUSION

For the above stated reasons, defendants' motion to dismiss is GRANTED, and plaintiffs' motion to strike is rendered moot. The clerk is directed to close this case.

This the 12th day of November, 1999.

MALCOLM J. HOWARD
United States District Judge

At Greenville, N.C.
9

JUDGMENT IN A CIVIL CASE

CIV OB # 62, p.24

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED defendants' motion to dismiss is granted. The plaintiffs shall have and recover nothing of the defendants and this case is closed.

SO ORDERED - /s/Malcolm J. Howard, United States District Judge

This Judgment filed and entered on November 15, 1999 and copies mailed to:

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November 15, 1999
Date

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 99-2685
CA-99-84-4-H3

ALEX STEVENSON, by and through his father and next friend, Elmer William Stevenson; ELMER WILLIAM STEVENSON, on his own behalf,
Plaintiffs - Appellants,

v.

MARTIN COUNTY BOARD OF EDUCATION; WILLIE C. PEELE, Superintendent of Martin County Schools, individually and in his official capacity; HARRY D. RESPASS, Principal of Williamston Middle School, individually and in his official capacity; SWANOLA CHANCE, teacher at Williamston Middle School, individually and in her official capacity,
Defendants - Appellees.

Filed: March 6, 2001
Entered: March 6, 2001

On Petition for Rehearing and Rehearing En Banc

The appellants' petition for rehearing and rehearing en banc was submitted to this Court. As no

member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court

/s/ Patricia S. Connor
CLERK

ARTICLE I, § 15
CONSTITUTION OF NORTH CAROLINA

Sec. 15. Education.

The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right. (Michie 1997).

CHAPTER 115C.
ELEMENTARY AND SECONDARY EDUCATION

SUBCHAPTER IV.
EDUCATION PROGRAM

ARTICLE 8C.
LOCAL PLANS FOR ALTERNATIVE SCHOOLS/ALTERNATIVE LEARNING PROGRAMS AND MAINTAINING SAFE AND ORDERLY SCHOOLS

N.C.G.S. § 115C-105.45 (Michie 1997). Legislative findings

The General Assembly finds that all schools should be safe, secure, and orderly. If students are to aim for academic excellence, it is imperative that there is a climate of respect in every school and that every school is free of disruption, drugs, violence, and weapons. All schools must have plans, policies, and procedures for dealing with disorderly and disruptive behavior. All schools and school units must have effective measures for assisting students who are at risk of academic failure or of engaging in disruptive and disorderly conduct.

N.C.G.S. § 115C-105.47 (Michie 1997). Local safe school plans

(a) Each local board of education shall develop a local school administrative unit safe school plan designed to provide that every school in the local school administrative unit is safe, secure, and orderly, that there is a climate of respect in every school, and that appropriate personal conduct is a priority for all students and all public school personnel. The board shall include parents, the school community, representatives of the community, and others in the development or review of this plan. The plan may be developed by or in conjunction with other committees.

(b) Each plan shall include each of the following components:

(1) Clear statements of the standard of behavior expected of students at different grade levels and of school personnel and clear statements of the consequences that will result from one or more violations of those standards. There shall be a statement of consequences for students under the age of 13 who physically assault and seriously injure a teacher or other individual on school property or at a school-sponsored or school-related activity. The consequences may include placement in an alternative setting.

(2) A clear statement of the responsibility of the superintendent for coordinating the adoption and the implementation of the plan, evaluating principals' performance regarding school safety, monitoring and evaluating the implementation of safety plans at the school level, and coordinating with local law enforcement and court officials appropriate aspects of implementation of the plan. The statement of responsibility shall provide appropriate disciplinary consequences that may occur if the superintendent fails to carry out these responsibilities. These consequences may include a reprimand in the superintendent's personnel file or withholding of the superintendent's salary, or both.

(3) A clear statement of the responsibility of the school principal for restoring, if necessary, and maintaining a safe, secure, and orderly school environment and of the consequences that may occur if the principal fails to meet that responsibility. The principal's duties shall include exhibiting appropriate leadership for school personnel and students, providing for alternative placements for students who are seriously disruptive, reporting all criminal acts under G.S. 115C-288(g), and providing appropriate disciplinary consequences for disruptive students. The consequences to the principal that may occur shall include a reprimand in the principal's personnel file and disciplinary proceedings under G.S. 115C-325.

(4) Clear statements of the roles of other administrators, teachers, and other school personnel in restoring, if necessary, and maintaining a safe, secure, and orderly school environment.

(5) Procedures for identifying and serving the needs of students who are at risk of academic failure or of engaging in disruptive or disorderly behavior.

(6) Mechanisms for assessing the needs of disruptive and disorderly students and students who are at risk of academic failure, and providing them with services to assist them in achieving academically and in modifying their behavior, and removing them from the classroom when necessary.

(7) Measurable objectives for improving school safety and order.

(8) Measures of the effectiveness of efforts to assist students at risk of academic failure or of engaging in disorderly or disruptive behavior.

(9) Professional development clearly matched to the goals and objectives of the plan.

(10) A plan to work effectively with local law enforcement officials and court officials to ensure that schools are safe and laws are enforced.

(11) A plan to provide access to information to the school community, parents, and representatives of the local community on the ongoing implementation of the local plan, monitoring of the local plan, and the integration of educational and other services for students into the total school program.

(12) The name and role description of the person responsible for implementation of the plan.

(13) Direction to school improvement teams within the local school administrative unit to consider the special conditions at their schools and to incorporate into their school improvement plans the appropriate components of the local plan for maintaining safe and orderly schools.

(14) A clear and detailed statement of the planned use of federal, State, and local funds allocated for at-risk students and alternative schools and alternative learning programs.

(15) Any other information the local board considers necessary or appropriate to implement this Article.

A local board may develop its plan under this section by conducting a comprehensive review of its existing policies, plans, statements, and procedures to determine whether they: (i) are effective; (ii) have been updated to address recent changes in the law; (iii) meet the current needs of each school in the local school administrative unit; and (iv) address the components required to be included in the local plan. The board then may consolidate and supplement any previously developed policies, plans, statements, and procedures that the board determines are effective and updated, meet the current needs of each school, and meet the requirements of this subsection.

Once developed, the board shall submit the local plan to the State Board of Education and shall ensure the plan is available and accessible to parents and the school community. The board shall provide annually to the State Board information that demonstrates how the At-Risk Student Services/Alternative Schools Funding allotment has been used to (i) prevent academic failure and (ii) promote school safety.

(c) A local board may amend the plan as often as it considers necessary or appropriate.

(2)

Supreme Court, U.S.
FILED
AUG 8 2001
CLERK

No. 00-1821

In The

Supreme Court of the United States

ALEX STEVENSON, by and through his father and next friend, Elmer William Stevenson; ELMER WILLIAM STEVENSON, on his own behalf,

Petitioners,

v.

MARTIN COUNTY BOARD OF EDUCATION; WILLIE C. PEELE, Superintendent of Martin County Schools, individually and in his official capacity; HARRY D. RESPASS, Principal of Williamston Middle School, individually and in his official capacity; SWANOLA CHANCE, teacher at Williamston Middle School, individually and in her official capacity,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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BRIEF OPPOSING PETITION FOR CERTIORARI

The Stevensons – Alex and his father – have petitioned for certiorari to review the decision of the Fourth Circuit Court of Appeals. The Martin County Board of Education and the school officials who are the other defendants in this case oppose the petition. At issue is whether the Court should recognize for the first time, as the Stevensons argue, a federal constitutional right of public school students to be protected from harm by other students, or whether the subject should continue to be left to state law. While the Stevensons' lawsuit is of considerable interest to these parties, there is nothing sufficiently remarkable about it, legally or factually, to warrant this Court's review. The Stevensons incorrectly assert that the decision of the Fourth Circuit conflicts with decisions in other circuits. In fact, the Fourth Circuit opinion is consistent with a long line of cases from the other circuits.

STATEMENT OF FACTS

Although respondent school officials would dispute the Stevensons' version of the facts if this case were to be tried, the case is before the Court on a motion to dismiss and, therefore, the Court must take the facts as alleged. The essential allegations are that Alex Stevenson was a sixth grader at Williamston Middle School in Martin County from August through October 1998 (Joint Appendix at 8);[1] he was assaulted by another student while at

[1] Joint Appendix or "J.A." refers to the Joint Appendix on file with the Fourth Circuit Court of Appeals.

school on 18 September 1998 (J.A. at 11-13); he contends that the superintendent and school principal should have known that he was threatened and should have acted to prevent the assault (J.A. at 16-17); and that his father withdrew Alex from the Martin County Schools on 29 October 1998 to attend private school for the remainder of the academic year (J.A. at 8, 16). Despite the assertion that school officials did nothing in response to Alex's problems, the Complaint acknowledges that as early as August 10th another student was suspended for fighting with Alex (Complaint, ¶ 16, J.A. at 10); that later in August Alex himself was suspended for fighting, as was another student (Complaint, ¶¶ 17-18, J.A. at 10); that yet another student involved in the August altercation was suspended (Complaint, ¶ 23, J.A. at 11); and that two students were suspended and sent to separate schools as a result of the September 18th incident (Complaint, ¶ 51, J.A. at 13).

ARGUMENT AGAINST GRANTING WRIT

The Stevensons argue that certiorari should be granted because (1) this Court has not decided whether students have a federal constitutional right to protection from harm by other students, (2) the Fourth Circuit decision is in conflict with decisions of this Court and of the Third, Fifth and Tenth circuits and the North Carolina Supreme Court, and (3) the circuit courts "have struggled" with the circumstances in which a state can be held liable for harm inflicted by non-state actors.

Actualiy, this Court has provided ample guidance on the issues in this case and there is no conflict within the circuits. *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989), held that the Due Process Clause does not establish a duty of public officials to protect individuals from harm by others unless a "special relationship" has been established between the governmental agency and the person injured. Although *DeShaney* itself did not concern public schools, the circuit courts for the Third, Fifth, Sixth, Seventh, Eighth and Tenth circuits all have decided that school attendance does not create such a special relationship as to impose liability. No circuit court has decided the other way.

The "conflicts" the Stevensons cite with the Third, Fifth and Tenth circuits are not over the issue of a *DeShaney* special relationship, but, as the Stevensons see it, over a more general question of the framework for analysis of the due process right in other contexts. Whether or not the Stevensons are correct about such a conflict, it has not affected the application of *DeShaney* to school circumstances.

Likewise, there is no conflict with decisions of the North Carolina Supreme Court. The state court has not addressed the federal constitutional right to protection, but it has consistently recognized a state common law action for negligence against school personnel for failing to protect students against injury by other students. The Stevensons do not address that case law but instead cite recent state appellate decisions about the public duty doctrine. The public duty doctrine is an exception to the general rules of liability which would be relevant only if

state courts had held that it applied to school officials, but they have not.

I. THE FOURTH CIRCUIT DECISION IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT.

The Stevensons argue that school safety is a matter of great public importance and that students' right to protection is an issue which has not been addressed by this Court. The Martin County school board does not dispute, by any means, that school violence is an issue of paramount importance. Even in rural North Carolina, it is a matter of daily concern. Other than asserting the importance of the issue, however, the Stevensons do not explain how creating a federal constitutional right – presumably spawning considerable litigation in federal court – would enhance students' safety. State law already recognizes a tort action for the failure to protect, *James v. Charlotte-Mecklenburg Bd. of Educ.*, 60 N.C. App. 642, 300 S.E.2d 21 (1983), and state statutes require school officials to adopt and implement detailed school safety plans, N.C. Gen. Stat. § 115C-105.45 *et seq.* In addition to any tort liability, the failure to meet their obligations under those statutes can subject the superintendent, principal and teacher to disciplinary action including the withholding of salary and dismissal. *See* N.C. Gen. Stat. §§ 115C-105.47(b)(2) and (3), and -325(e)(1)a, d, i and j. There is no reason to believe that adding federal litigation to the consequences school officials already face would make them more responsible.

A. *DeShaney* establishes that Alex did not have a liberty interest subject to protection, because his attendance at school did not create a special relationship that would trigger due process rights.

As the district court found, the Stevensons did not allege deprivation of a liberty interest, only a property interest. (Appendix to Petitioners' Petition, at 24). Their first cause of action is entitled "Fourteenth Amendment to the US Constitution Deprivation of Property without due process of law." (J.A., at 16). The only numbered paragraph for that cause of action says the defendants "arbitrarily and capriciously deprived Alex Stevenson of his property interest to public education without due process of law in violation of the Fourteenth Amendment of the US Constitution." (Complaint, ¶ 82, J.A. at 17). Nevertheless, the Fourth Circuit considered the liberty interest argument, and it is the centerpiece of the Stevensons' petition to this Court.

The Stevensons are correct that this Court has not addressed the issue of school officials' responsibility under the Due Process Clause for protection of students from harm by other students. *DeShaney* offers sufficient guidance for school cases, however, and nothing in the Fourth Circuit opinion in this case conflicts with *DeShaney*.

The *DeShaney* court began by observing that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." 489 U.S. at 195. A due process right can arise, however, "when the

State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself. . . . " *Id.*, at 200.

> In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf – through incarceration, institutionalization, or other similar restraint of personal liberty – which is the 'deprivation of liberty' triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

Id., at 200. The Court recognized that a governmental agency may acquire a duty under state tort law, but "the Due Process Clause of the Fourteenth Amendment . . . does not transform every tort committed by a state actor into a constitutional violation." *Id.*, at 202.

Courts of appeal have had no difficulty applying *DeShaney* to the public school setting – as discussed in Part II below – consistently holding that school attendance does not establish a special relationship. Because the *DeShaney* line of cases is so clear, the Stevensons rely on *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999), for their argument that the Fourth Circuit holding is in conflict with this Court's decisions. Although the Stevensons mix legal theories at times, the crux of their argument is that *Davis* establishes a basis for school officials' liability when they had notice of student-on-student violence and failed to stop it. *Davis*, though, is not about due process, it is about a statutorily created right of action.

The *Davis* lawsuit was brought under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* That federal statute specifically prohibits discrimination on the basis of gender in education programs that receive federal funds. 20 U.S.C. § 1681(a). In *Cannon v. University of Chicago*, 441 U.S. 677, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979), the Court recognized a private right of action under Title IX. Then, in 1992, the Court held in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 112 S. Ct. 1028, 117 L. Ed. 2d 208 (1992), that money damages were available in such suits, and in 1998 decided in *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 118 S. Ct. 1989, 141 L. Ed. 2d 277 (1998), that damages could be awarded for teacher-student sexual harassment.

The question in *Davis* was whether the private right of action for damages under Title IX extended to student-on-student sexual harassment. The Court's decision, based on the history and purpose of Title IX, does not expand the meaning of due process. Consequently, nothing in the Fourth Circuit's decision in the present case is in conflict with *Davis*.[2]

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[2] The Stevensons seem to have abandoned their argument, relied upon so greatly at the trial and circuit level, that the Safe and Drug-Free Schools and Communities Act of 1994, 20 U.S.C. § 7101 *et seq.*, creates a private right of action comparable to the Title IX statutory right enforced in *Davis*. The Fourth Circuit properly found that the Safe Schools Act is only a federal grant program; that nothing in the language or purpose of the act suggests such a right; that the Department of Education has promulgated no regulations pursuant to the act; and that no court has held that the act creates a private right of action. Even if the Safe Schools Act were held to create a private right of action, no board liability for damages would exist because the

B. Deprivation of a property interest cannot be based on the student's own withdrawal from school.

The Stevensons' Complaint does allege the deprivation of a property interest in education. Both the district and circuit courts found that the claim failed because of the Stevensons' voluntary withdrawal from the Martin County schools. Due process is at issue only when school officials dismiss or suspend a student so as to deprive the child of the right to public education. *See, e.g., Goss v. Lopez*, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975) (suspension of student for more than "trivial" period); *Board of Educ. of Rogers, Arkansas v. McCluskey*, 458 U.S. 966, 102 S. Ct. 3469, 73 L. Ed. 2d 1273 (1982) (*per curiam*) (suspension for alcohol use); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 106 S. Ct. 3159, 92 L. Ed. 2d 549 (1986) (discipline for use of obscene language).

Although the theory was not used at the district court, the Stevensons argued to the Fourth Circuit, and repeat in their petition to this Court, that Alex was constructively expelled from school. The Fourth Circuit observed that this "is a novel theory that has not yet been accepted by any court" and that the Stevensons had not

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board would not have received adequate notice of its potential liability. *See Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 101 S. Ct. 1531, 67 L. Ed. 2d 694 (1981). The individual defendants would have qualified immunity because their conduct did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982).

alleged sufficient facts to support it. (Appendix to Petitioners' Petition, at 8). Moreover, the Stevensons' analogy to constructive discharge in employment cases is inappropriate. In those cases, the constructive discharge is not the offense itself, it is only one element of a claim of discrimination; the actionable conduct must be directed toward a specific individual and not be a claim of generally poor working conditions, *Holsey v. Armour & Co.*, 743 F.2d 199 (4th Cir. 1984), *cert. denied*, 470 U.S. 1028, 105 S. Ct. 1395, 84 L. Ed. 2d 784 (1985); and there must be proof that the employer intended to force the employee to quit, *EEOC v. Federal Reserve Bank of Richmond*, 698 F.2d 633 (4th Cir. 1983), *rev'd on other grounds*, 467 U.S. 867, 104 S. Ct. 2794, 81 L. Ed. 2d 718 (1984).

II. THE FOURTH CIRCUIT DECISION IS CONSISTENT WITH THE HOLDINGS IN OTHER CIRCUITS.

The circuit courts of appeal are consistent in applying *DeShaney* in school cases. Uniformly, they have held that compulsory school attendance does not establish a special relationship within the meaning of *DeShaney* to trigger due process rights. "Only where the state has exercised its power so as to render an individual unable to care for himself or herself may an affirmative duty to protect that individual arise." *J.O. v. Alton Community Unit Sch. Dist. 11*, 909 F.2d 267, 272 (7th Cir. 1990). School attendance does not meet that test because "the government, acting through local school administrations, has not rendered its school children so helpless that an affirmative duty to protect arises" under the Due Process Clause. *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364,

1371 (3d Cir. 1992) (*en banc*), *cert. denied*, 506 U.S. 1079, 113 S. Ct. 1045, 122 L. Ed. 2d 354 (1993).

The same decision was reached, often in the most excruciating circumstances, in *Black v. Indiana Area Sch. Dist.*, 985 F.2d 707 (3d Cir. 1993); in *Sargi v. Kent City Bd. of Educ.*, 70 F.3d 907 (6th Cir. 1995); in *Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d 729 (8th Cir. 1993); and in *Graham v. Independent Sch. Dist. No. T-89*, 22 F.3d 991 (10th Cir. 1994). School officials' actual or constructive knowledge of previous threats or assaults by the third party have not changed the outcome of the cases. *Maldonado v. Josey*, 975 F.2d 727 (10th Cir. 1992), *cert. denied*, 507 U.S. 914, 113 S. Ct. 1266, 122 L. Ed. 2d 662 (1993); *Graham, supra; Middle Bucks, supra.*

The Stevensons also argue that school officials created the danger to Alex and, under *DeShaney*, may be held liable on that basis. However, it was other students, not school personnel, who created the danger. For the Stevensons to succeed on a danger-created theory, "the environment created by the state actors must be dangerous; they must know it is dangerous; and, to be liable, they must have used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur." *Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198, 201 (5th Cir. 1994), *cert. denied*, 514 U.S. 1017, 115 S. Ct. 1361, 131 L. Ed. 2d 218 (1995). Consequently, the circuit courts have rejected school liability under danger-created claims just as consistently as with the special relationship theory. *Doe v. Hillsboro Indep. Sch. Dist.*, 113 F.3d 1412 (5th Cir. 1997); *Middle Bucks, supra; Sargi, supra; Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996).

It is not out of indifference to students' safety or lack of sympathy for their suffering that the courts reject the due process lawsuits. It is, rather, because schools do not have the custodial relationship to establish a constitutional duty to protect. It is because the students' and parents' remedies lie, instead, in state tort law. "Whatever duty does arise is best left to laws outside the Constitution. . . . " *Alton Community*, 909 F.2d at 272. "A State may, through its courts and legislatures, impose such affirmative duties of care and protection upon its agents as it wishes. But not 'all common-law duties owed by government actors were . . . constitutionalized by the Fourteenth Amendment.' " *DeShaney*, 489 U.S. at 202 (quoting *Daniels v. Williams*, 474 U.S. 327, 335, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986)).

There is one recent case from the Tenth Circuit finding school officials liable under a danger-created theory. The decision does not seem consistent with other Tenth Circuit decisions and is based on facts that clearly distinguish it from the Stevensons' case.

In *Sutton v. Utah State Sch. for the Deaf and Blind*, 173 F.3d 1226 (10th Cir. 1999), the Tenth Circuit first rejected a claim against the principal, Moore, because "Moore himself did not personally, affirmatively place James [the student] in any danger," but then decided there was a viable claim for failing to train adequately school employees or implement a policy to prevent the assault. The *Sutton* decision seems to contradict earlier Tenth Circuit decisions on state-created danger, such as *Uhlrig v. Harder*, 64 F.3d 567 (10th Cir. 1995). Also, the court does not explain how the inadequate training enhanced the

danger to the student. The answer seems to lie in the condition of the student.

James Sutton was 14 years old, but "he had severe cerebral palsy . . . he was mentally the age of a three to five-year-old child, and . . . he was totally blind and could not speak." *Sutton*, 173 F.3d at 1240. It would seem to be this helpless condition, including James' inability to communicate except by sign language to his mother, that gave rise to the principal's obligation to develop a policy and train others. The same circumstances did not exist for Alex Stevenson. He communicated frequently with school personnel, spoke with his father daily, had no different mental ability than other students his own age, and was not in a helpless condition. Admittedly, the outcome of *Sutton* differs from the outcome of the present case – just as it conflicts with other Tenth Circuit cases such as *Maldonado v. Josey, supra*, and *Graham v. Independent Sch. Dist. No. T-89, supra* – but the conflict is the result of an extreme difference in facts rather than a different view of the law.

In their petition the Stevensons claim conflicts with decisions of the Third, Fifth and Tenth circuits. Except for *Sutton*, the cases they cite are not school cases and the conflict they perceive has to do with different articulations of the state liability analysis in other contexts. The Stevensons' discussion ignores the school cases directly on point in those three circuits, such as *D.R. v. Middle Bucks Area Vocational Technical Sch., supra*, and *Black v. Indiana Area Sch. Dist., supra* (Third Circuit), *Doe v. Hillsboro Indep. Sch. Dist., supra* (Fifth Circuit), and *Maldonado v. Josey, supra*, and *Graham v. Independent Sch. Dist. No. T-89, supra* (Tenth Circuit). The Stevensons do cite

another case from the Third Circuit, *Fenstermaker v. Nesfedder*, 802 F. Supp. 1258 (E.D. Pa. 1992), *aff'd in part and vacated in part*, 9 F.3d 1540 (3d Cir. 1993), for the proposition, they say: "school liable when coach, who did not participate, stood by and allowed students to engage in hazing ritual." *Fenstermaker*, however, is about a wrestling coach's decision to have an injured student continue competing after being injured, and the district court found no liability. The Third Circuit decision is unpublished and unavailable to respondents.

III. THERE IS NO CONFLICT BETWEEN THE FOURTH CIRCUIT DECISION AND DECISIONS OF THE NORTH CAROLINA SUPREME COURT.

The Stevensons' argument about conflict with North Carolina Supreme Court decisions on the public duty doctrine is beside the point.

The public duty doctrine generally holds that public officials who act upon a duty to protect the public generally are not liable for the failure to protect specific individuals. In a series of cases over the last several years, the North Carolina Supreme Court has wrestled with the applicability of the doctrine to anyone other than law enforcement officers, but that debate is irrelevant to the Stevensons' case.

The public duty doctrine might have a place in an argument about school officials' liability under state law, if that were an issue. State law, however, long has recognized an action for negligence when school personnel fail to protect students from harm by other students, applying general common law principles. *James v. Charlotte-*

Mecklenburg Bd. of Educ., 60 N.C. App. at 648, 300 S.E.2d at 24 ("foreseeability of harm to pupils in the class or at the school is the test of the extent of a teacher's duty to safeguard her pupils from dangerous acts of fellow pupils").

The Fourth Circuit decision in the instant case is not in conflict with North Carolina law on school officials' tort liability, nor with the cases on the public duty doctrine. Even if there were such a conflict, it would only pertain to matters of state law, with no effect on the federal due process analysis.

CONCLUSION

The decision of the Fourth Circuit Court of Appeals in this case is not in conflict with any decision of this Court, decisions from other circuits, or decisions of the North Carolina Supreme Court. The petition for writ of certiorari should be denied.

RESPECTFULLY SUBMITTED, this 8th day of August 2001.

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